Supreme Court, U.S.
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No. _____

In the
Supreme Court of the United States
October Term, 1993

ITT COMMERCIAL FINANCE CORP.,
a Nevada corporation;
ITT FINANCIAL CORPORATION,
a Delaware corporation;
ITT CORPORATION,
a Delaware corporation,

Petitioners,

v.

RICHARD C. GAWORSKI;
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does St. Mary's Honor Center v. Hicks, 113 S.Ct. 2742 (1993), preclude a court from granting an employer a judgment as a matter of law in an age discrimination case when an employee has established a McDonnell Douglas prima facie case of age discrimination and challenged the business explanation given by the employer for its actions?

2. Is a verdict of age discrimination reasonably supported by evidence which simply challenges an employer's business rationale for reducing the size of its workforce, laying off a 56 year-old employee, and reassigning the bulk of the employee's duties to a 47 year-old incumbent co-worker?

3. Must a petition for rehearing in banc pursuant to Federal Rule of Appellate Procedure 35 and 28 U.S.C. § 46 be granted when it is supported by five of the eight active members of a United States Court of Appeals who are available to participate in consideration of the petition?

LIST OF PARTIES

All parties to this petition are listed in the caption.

RULE 29.1 LIST

ITT Financial Corporation is the corporate parent of ITT Business Services Corporation, which is the corporate parent of ITT Commercial Finance Corp. ITT Corporation is, in turn, the corporate parent of ITT Financial Corporation. ITT Corporation's other subsidiaries (other than wholly owned subsidiaries) include: Abbey Life Insurance Company of Canada; Alcatel Alshom; Golden Pages, Ltd.; Hoteles Sheraton de Portugual Sarl; Isostat (France); ITT Composants et Instruments; ITT Flygt SA; ITT Hancock de Mexico S.A.; ITT Industrie-Beteiligungsgesellschaft MBH; ITT Paginas Amarelas S.A.; ITT World Directories (UK) Ltd.; ITT World Directories Management Limited; ITT World Directories Netherlands B.V.; ITT World Directories, Inc.; Mactec AB; Metalicht BV; P.E.A. Industrial S.A. de C.V.; Sheraton Tunisia Management Corporation; Sociedad Immobiliara San Cristobal SA; Steam Boat Village Real Estate Corp; Transatlantisch Beteiligungs-AG; Washington Sheraton Corporation.

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

ITT COMMERCIAL FINANCE CORP., a Nevada corporation;
ITT FINANCIAL CORPORATION, a Delaware corporation;
ITT CORPORATION, a Delaware corporation,

Petitioners,

v.

RICHARD C. GAWORSKI;
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioners ITT Commercial Finance Corp., ITT Financial Corporation, and ITT Corporation (collectively "ITT") pray that a writ of certiorari issue to review the judgment, opinion, and orders of the United States Court of Appeals for the Eighth Circuit, which affirmed in part and reversed in part the judgment of the United States District Court for the District of Minnesota in this case.

OPINIONS BELOW

The United States District Court for the District of Minnesota denied petitioners' motion for summary judgment in an unpublished opinion, dated May 19, 1989, which is included in the Appendix as Exhibit E. The District Court denied a second motion for summary judgment in an unpublished opinion, dated September 17, 1990, which is included in the Appendix as Exhibit F. The District Court denied petitioners' motion for judgment notwithstanding the verdict or in the alternative for a new trial in an unpublished decision, dated February 4, 1992, which is included in the Appendix as Exhibit H. The District Court determined the amount of damages in an unpublished opinion, dated February 4, 1992, which is included in the Appendix as Exhibit I. The District Court clarified its opinion regarding damages in an unpublished decision, dated February 14, 1992, which is included in the Appendix as Exhibit J.

The United States Court of Appeals for the Eighth Circuit reviewed the District Court's opinions in an opinion published as Gaworski v. ITT Commercial Fin. Corp., 17 F.3d 1104 (8th Cir. 1994), which is included in the Appendix as Exhibit A. The Eighth Circuit denied petitioners' motion for a rehearing and request for rehearing in banc in an unpublished order, dated April 20, 1994, which is included in the Appendix as Exhibit B. The Eighth Circuit clarified this order in an unpublished order, dated April 21, 1994, which is included in the Appendix as Exhibit C. The Eighth Circuit denied petitioners' motion for reconsideration of the decision not to rehear the case in banc in an unpublished order, dated June 8, 1994, which is included in the Appendix as Exhibit D.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on March 2, 1994. A timely petition for rehearing and request for rehearing in banc was denied by an order dated April 20, 1994, which is included in the Appendix as Exhibit B. This petition for certiorari is filed within 90 days of that date. This Court has jurisdiction to review the judgment of the Court of Appeals by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq. ("ADEA"), provides, in relevant part:

> It shall be unlawful for an employer--
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;
>
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or
>
> (3) to reduce the wage rate of any employee in order to comply with this chapter.

29 U.S.C. § 623. The ADEA also provides, in relevant part:

(1) Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter: *Provided*, That the right of any person to bring such action shall terminate upon the commencement of an action by the Equal Employment Opportunity Commission to enforce the right of such employee under this chapter.

(2) In an action brought under paragraph (1), a person shall be entitled to a trial by jury of any issue of fact in any such action for recovery of amounts owing as a result of a violation of this chapter, regardless of whether equitable relief is sought by any party in such action.

29 U.S.C. § 626(c).

Title 28, United States Code, section 46, provides in relevant part:

(c) Cases and controversies shall be heard and determined by a court or panel of not more than three judges (except that the United States Court of Appeals for the Federal Circuit may sit in panels of more than three judges if its rules so provide), unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in regular active service. A court in banc shall consist of all circuit judges in regular active service, or such number of judges as may be prescribed in accordance with section 6 of Public Law 95-486 (92 Stat. 1633), except that any senior circuit judge of the circuit shall be eligible to

participate, at his election and upon designation and assignment pursuant to section 294(c) of this title and the rules of the circuit, as a member of an in banc court reviewing a decision of a panel of which such judge was a member.

Federal Rule of Appellate Procedure 35 provides, in relevant part:

> (a) **When Hearing or Rehearing in Banc Will be Ordered.** A majority of the circuit judges who are in regular active service may order that an appeal or other proceeding be heard or reheard by the court of appeals in banc. Such a hearing or rehearing is not favored and ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance.
>
> (b) **Suggestion of a Party for Hearing or Rehearing in Banc.** A party may suggest the appropriateness of a hearing or rehearing in banc. No response shall be filed unless the court shall so order. The clerk shall transmit any such suggestion to the members of the panel and the judges of the court who are in regular active service but a vote need not be taken to determine whether the cause shall be heard or reheard in banc unless a judge in regular active service or a judge who was a member of the panel that rendered a decision sought to be reheard requests a vote on such a suggestion made by a party.

STATEMENT OF THE CASE

Richard Gaworski lost his job as Manager of Credit and Operations in July of 1986 at a time when the commercial lending work unit of which he was a part, the Capital Resources Group ("CRG"), was permanently reduced from 17 to 13 employees. This lawsuit, which is premised on the ADEA and properly brought in federal court pursuant to 28 U.S.C. § 1331, revolves around his specific claim that he was selected for termination of employment because of his age. Mr. Gaworski was 56 years old at the time of his termination. The other three employees who were laid off from CRG at the same time were all under 40 years of age. The 13 CRG employees who survived the reduction ranged in age both above and below the protected age of 40.

The decision that a reduction in the number of employees was necessary and the decisions about whom to lay off and whom to retain were made by Michael Guimbarda, the top CRG official. Mr. Guimbarda's stated reasons for selecting Mr. Gaworski for layoff had to do with the differing skills and backgrounds of Mr. Gaworski and 47 year-old John Olker, the incumbent employee who inherited most of Mr. Gaworski's duties after the layoff. Mr. Gaworski had a history of holding senior financial management positions, having been a partner in a major national accounting firm and a controller with another large ITT subsidiary. Mr. Olker had worked for ITT companies for eight years longer than had Mr. Gaworski, primarily in jobs involving the development and maintenance of computer systems. Mr. Olker's work experience during the two years before the layoff involved direct customer contact and hands-on development of credit application files plus the creation and maintenance of the computer system used throughout CRG. Mr. Guimbarda explained that in the reduced work force which would feature compressed middle

management, he valued what he saw to be Mr. Olker's more specialized computer skills over Mr. Gaworski's staff financial management skills.

There was no evidence of any kind that Mr. Guimbarda or anyone else ever made any statement reflecting age bias or preference. There was no attempted statistical showing of disproportionate selection, relative to this layoff or to any other employment decisions. No company policies or practices were identified as illegally discriminatory in any way.

The thrust of Mr. Gaworski's evidence at trial was simply to bolster the proposition that, in fact, Mr. Gaworski would have been more valuable to CRG after the reduction in force than Mr. Olker. There was also evidence that Mr. Gaworski earned more than Mr. Olker, that Mr. Olker absorbed most of Mr. Gaworski's managerial duties, in addition to Mr. Olker's prior duties, and that an unauthenticated job description describing Mr. Olker's job after the layoff failed to include computer system responsibilities among Mr. Olker's duties.

On the basis of this record, Mr. Gaworski successfully argued below that, pursuant to McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), he had proven age discrimination by showing that he was over 40 years of age, that he was not unqualified for the work he had done, that his employment was terminated, that his duties were reassigned to a younger man, and that the stated reasons for his supervisor's selection of Mr. Gaworski rather than Mr. Olker for layoff were inaccurate and therefore were a "pretext". Neither the District Court nor the 2-1 majority of the Court of Appeals panel granted ITT's request that the jury verdict of age discrimination for Mr. Gaworski be set aside. ITT's petition for rehearing in banc was denied even though five of the eight judges who voted on the petition voted in its favor. (App. B-D).

REASONS FOR GRANTING THE WRIT

In this case the Eighth Circuit contributed to a widening breach among the circuits by adding precedent supporting the untenable proposition that a presumption of discrimination under the McDonnell-Douglas analysis, when coupled merely with a challenge to an employer's business judgment, forecloses the employer's opportunity to obtain judgment as a matter of law. As a result, this case also contributes to the growing ambiguity surrounding the Hicks case. This Court, therefore, should grant certiorari to address these important issues in the highly litigious area of employment discrimination law.

Gaworski further presents the Supreme Court with a needed opportunity to clarify the application of McDonnell Douglas principles to age discrimination claims arising in the context of a stipulated (here, 23%) reduction in force. This Court needs to clarify that when duties pass from qualified but excess employees to slightly younger incumbent workers, no reasonable basis for an inference of age discrimination exists.

Finally, this Court should clarify the requirements under Federal Rule of Appellate Procedure 35 and 28 U.S.C. § 46 for rehearing in banc. In this case, a majority of the judges who voted on ITT's petition for rehearing in banc voted in favor of granting the rehearing, but the petition was denied because the five judges did not constitute an absolute majority of the Eighth Circuit. As a result, the Court in banc was deprived of its right to redress the errors in the panel opinion, and petitioner lost a critical component of its right to review.

I. THIS COURT SHOULD CLARIFY THAT HICKS DOES NOT PRECLUDE A COURT FROM GRANTING AN EMPLOYER A JUDGMENT AS A MATTER OF LAW EVEN IF A FORMER EMPLOYEE HAS ESTABLISHED A McDONNELL DOUGLAS PRIMA FACIE CASE OF AGE DISCRIMINATION AND CAN CHALLENGE THE EMPLOYER'S BUSINESS JUSTIFICATION OF A QUESTIONED EMPLOYMENT DECISION.

While lower courts are rarely called upon to award judgment to a discrimination plaintiff as a matter of law, the courts routinely are asked to screen insubstantial discrimination claims to determine if they warrant the time and expense of trial or, following trial, if they stand on a foundation of evidence as opposed to mere sympathetic speculation. No calling is more fundamental to the judicial role than the imposition of the discipline of law on the evaluation of passionate accusations of offensive conduct. Few accusations carry greater potential for emotional reaction or call for more careful legal management than those of illegal invidious discrimination leading to termination of employment.

In McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), this Court established a tripartite framework for analyzing allegations of employment discrimination that was "intended progressively to sharpen the inquiry into the elusive factual question of intentional discrimination." Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 254 n.7 (1981).[1] This framework requires, first, that the plaintiff create a presumption of discrimination by establishing a prima

[1] Although McDonnell Douglas involved a Title VII claim, the McDonnell Douglas framework also applies to ADEA claims. E.g., Beshears v. Asbill, 930 F.2d 1348, 1353 n.7 (8th Cir. 1991).

facie case of discrimination by a preponderance of the evidence. Id. at 252-53. Then, if the plaintiff carries this burden, "the burden shifts to the defendant 'to articulate some legitimate, non-discriminatory reason for the employee's rejection.'" Id. (quoting McDonnell Douglas, 411 U.S. at 804). Finally, if the defendant carries its burden of 'articulation,' the plaintiff is given the "opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination." Id. At this point, the only question for the court is whether the plaintiff has established the fact of intentional discrimination by a preponderance of the evidence. See id. at 254-56 & n.10. Any presumption of discrimination created by the establishment of a prima facie case "drops from the case." Id.

In Hicks, this Court revisited McDonnell Douglas and analyzed this framework to determine whether there are any situations in which a plaintiff is entitled to a judgment as a matter of law. The Court found there to be only one such situation:

> At the close of the defendant's case, the court is asked to decide whether an issue of fact remains for the trier of fact to determine. None does if, on the evidence presented, (1) any rational person would have to find the existence of facts constituting a prima facie case, and (2) the defendant has failed to meet its burden of production -- i.e., has failed to introduce evidence which, taken as true, would permit the conclusion that there was a nondiscriminatory reason for the adverse action. In that event the court must award judgment to the plaintiff as a matter of law. . . .

Hicks, 113 S.Ct. at 2748 (emphasis in original). The Court went on to state that:

> [I]f the defendant has failed to sustain its burden but reasonable minds could differ as to whether a preponderance of the evidence establishes the facts of a prima facie case, then a question of fact does remain, which the trier of fact will be called upon to answer.

Id. (emphasis in original). Finally, the Court held that a plaintiff is not entitled to judgment as a matter of law merely because the plaintiff establishes a prima facie case of discrimination and the jury disbelieves the reasons the defendant articulates for terminating the plaintiff:

> The factfinder's disbelief of the reasons put forward by the defendant . . . may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons, will permit the trier of fact to infer the ultimate fact of discrimination, and the Court of Appeals was correct when it noted that, upon such rejection, '[n]o additional proof of discrimination is required.' But the Court of Appeals' holding that rejection of the defendant's proffered reasons compels judgment for the plaintiff disregards the fundamental principle of [Federal] Rule [of Evidence] 301 that a presumption does not shift the burden of proof, and ignores our repeated admonition that the Title VII [and ADEA] plaintiff at all times bears the 'ultimate burden of persuasion.'

Id. at 2749 (internal citations omitted; emphasis in original).

In this case, the Eighth Circuit relied on Hicks -- and, in particular, the last passage cited above -- to determine that a defendant is never entitled to a judgment as a matter of law if "(1) the elements of a prima facie case are present, and (2) there exists sufficient evidence for a reasonable jury to reject the defendant's proffered reasons for its actions." Gaworski v. ITT Commercial Fin. Corp., 17 F.3d 1104, 1109 (8th Cir. 1994) (finding itself to be "without power to reverse the jury's finding" in such a situation). Instead, the Court of Appeals held that if a plaintiff has established a prima facie case of discrimination and introduced evidence suggesting that the employer's explanation of its actions is false, "the ultimate question of discrimination is for the finder of fact to decide." Id. In other words, and as the dissent recognized, the Court of Appeals held that the establishment of a prima facie case of discrimination combined with evidence challenging the employer's explanation creates an irradicable presumption of discrimination that denies the defendant any possibility of a judgment as a matter of law. Id. at 1117-22 (rejecting "the [majority's] proposition that the inference from the prima facie case has continuing preemptive force").[2]

The circuits are split on the issue of the proof an employee must present to avoid judgment as a matter of law. A number of other Courts of Appeals have held, like the Eighth Circuit in this case, that Hicks requires an employer's

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[2] This is the inverse of the error that the Court of Appeals made in Hicks. The Court of Appeals in Hicks erred in finding itself compelled to enter judgment as a matter of law for the plaintiff merely because it disbelieved "the defendant's proffered reasons." Hicks, 113 S. Ct. at 2749. The Court of Appeals in Gaworski erred in finding itself compelled not to enter judgment for the defendant because it found that Gaworski had established a prima facie case and presented evidence upon which a jury could disbelieve "the defendant's proffered reasons." Gaworski, 17 F.3d at 1109.

motion for summary judgment or judgment as a matter of law to be denied when an employee makes out a prima facie case of discrimination and challenges the explanation given for the employer's actions. See Mitchell v. Data Gen. Corp., 12 F.3d 1310, 1316 (4th Cir. 1993) (indicating that defendant is not entitled to summary judgment if plaintiff creates a factual dispute regarding reason for discharge); Anderson v. Baxter Healthcare Corp., 13 F.3d 1120, 1124 (7th Cir. 1994) (to survive summary judgment plaintiff need only "'produce evidence that the company lied' about its proffered reasons for his dismissal") (citation omitted); Washington v. Garrett, 10 F.3d 1421, 1433 (9th Cir. 1993) ("If a plaintiff succeeds in raising a genuine factual issue regarding the authenticity of the employer's stated motive, summary judgment [in favor of defendant] is inappropriate. . . ."). At least two other Courts of Appeal, however, also relying on Hicks, have held that an employee is not entitled to put its case to a jury (and a jury verdict may not be upheld) unless the employee has produced evidence that the employer's explanation of its actions is false and that the real reasons for the actions were discriminatory. See LeBlanc v. Great American Ins. Co., 6 F.3d 836, 843 (1st Cir. 1993), cert. denied, 114 S.Ct. 1398 (1994) ("Hicks requires that, once the employer has advanced a legitimate, nondiscriminatory basis for its adverse employment decision, the plaintiff, before becoming entitled to bring the case before the trier of fact, must show evidence sufficient for the factfinder reasonably to conclude that the employer's decision to discharge him or her was wrongfully based on age."); Bodenheimer v. PPG Indus., Inc., 5 F.3d 955, 957-58 (5th Cir. 1993) (affirming summary judgment in favor of defendant because plaintiff failed to establish that defendant's "reasons were pretext for age discrimination") (emphasis in original). ITT submits that the latter interpretation of Hicks is correct

and requires reversal of the Eighth Circuit's opinion in this case.[3]

Under the correct interpretation of Hicks, the Eighth Circuit could only have upheld the verdict in this case if a reasonable jury could have found that Gaworski proved, by a preponderance of the evidence and with any presumption of discrimination having "drop[ped] out of the picture, . . . 'that the defendant intentionally discriminated against [him]' because of his [age]." Hicks, 113 S.Ct. 2749. The Eighth Circuit applied the wrong standard, however, and found itself "without power to reverse the jury's finding" because it found that Gaworski had established a prima facie case of age discrimination and offered evidence that challenged ITT's reasons for his termination. In applying this standard, the Eighth Circuit denied ITT its right of appellate review of the critical issue: did Gaworski prove discrimination vel non by a preponderance of the evidence? The Court abandoned its -- and the trial court's -- role as a reviewer of verdicts and became a 'rubber stamp' that would uphold any verdict in any case in which a prima facie case was established and the employer's explanation for its actions challenged.[4] In order to

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[3] This split in the circuits is noted in Waldron v. SL Indus., Inc., 849 F. Supp. 996, 1004 n.11 (D.N.J. 1994), which analyzes the issue as one of a "pretext-only" standard versus a "pretext-plus" standard. ITT suggests that the question is more properly stated as whether the plaintiff need only show that the defendant's reasons are "false" in order to survive summary judgment (or a motion for judgment as a matter of law) or whether the plaintiff must also show that the defendant's reasons were "a pretext for discrimination."

[4] This is strikingly demonstrated from a comparison of the majority and dissenting opinions. The majority, viewing the 'evidence' through the prism of the plaintiff's prima facie case, found that the jury could have inferred a discriminatory intent. Gaworski, 17 F.3d at 1109-10. The dissent, rejecting "the court's proposition that the inference from the prima facie case has continuing preemptive force" and holding the plaintiff to his burden of proving discrimination by a preponderance of the evidence, found that none of

clarify Hicks and prevent the automatic affirmation of verdicts and the automatic denial of motions for summary judgment and judgment as a matter of law, this Court should grant certiorari.

II. THE LAW MUST INSIST THAT A VERDICT OF AGE DISCRIMINATION HAVE ROOTS IN FACTS REASONABLY POINTING TO THE CONCLUSION THAT AGE TAINTED THE EMPLOYER'S DECISION.

Judges across this country need guidance and discrimination litigants are exposed to inconsistent administration of justice due to serious ambiguities which persist about the circumstances, if any, upon which it is appropriate to award judgments to employers as a matter of law. The multitude of conflicting decisions which have so quickly followed this Court's decision in Hicks, the divided opinion in the Court of Appeals in this case, and the interest shown in the subjects raised here by a majority of the Court of Appeals judges who considered ITT's petition for rehearing in banc all attest to the significance and difficulty of these issues. Prevalent interpretations of the law which foreclose the protection of employers from unfounded discrimination claims must be directly addressed, at least in the context of situations where the **only age-related evidence** is the unremarkable passage of duties to a slightly younger co-employee during an undisputed reduction in force.

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the facts relied on by the majority "support an inference of age discrimination." Id. at 1118-22.

A. Gaworski Did Not Establish A Prima Facie Case Of Age Discrimination.

Whether resorting to the McDonnell Douglas framework or not, courts ultimately must be directed to answer the same question: is there something about the unique facts of the case that supports a reasonable inference of unlawful discrimination? See Burdine, 450 U.S. at 253-54. If an inference of discrimination arises from the case's unique facts, then a prima facie case has been made out, and the employer will bear the burden of articulating a non-discriminatory reason for its action. If such an inference does not arise, however, then the defendant is entitled to judgment in its favor as a matter of law. See e.g., Miner v. Bi-State Dev. Agency, 943 F.2d 912, 913-14 (8th Cir. 1991) (affirming directed verdict for employer when employee failed to prove prima facie case because he failed to show he was qualified).

Thus, in McDonnell Douglas, for example, the key element was that the employer rejected a fully qualified black job applicant but "continued to seek applicants from person's of complainant's qualifications." 411 U.S. at 802. Absent a convincing explanation, the inference of racial discrimination was deemed reasonable. In Turner v. Texas Instruments, Inc., 555 F.2d 1251 (5th Cir. 1977), the key element was that the employer discharged a black employee for violating company rules regarding time clock violations, but retained a white employee guilty of the same violations. 555 F.2d at 1254-55 (citing McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 280-85 (1976)). In Marks v. Prattco, Inc., 607 F.2d 1153 (5th Cir. 1979) the key element was that the employer fired five black women from a nine person crew, retained the remaining four white women, and then hired two additional white women to replace the fired employees. 607 F.2d at 1154-55. In each of these cases an inference of discrimination

reasonably could be drawn from the facts, and, thus, a prima facie case was stated.

This case differs from those cited above in that inferences of discrimination cannot be drawn from the facts in evidence. On the contrary, in the context of an undisputed reduction in the size of an incumbent work force, where no outside applications are considered, and where all duties necessarily fall to retained incumbent workers, there is simply no logical basis for inference of age discrimination from the completely likely and natural fact of duties passing to workers under the age of 56. Given the demographics of the working world, which features far more workers under 56, indeed under the age of 40 which marks the boundary of the class of older workers protected by the ADEA, there is nothing curious, nothing demanding explanation, about duties moving from older to younger (especially only slightly younger) workers.[5]

If an older, satisfactorily performing worker was "laid off" but immediately replaced by someone newly hired from outside the company, then a reasonable question (not yet an inference) would arise. Why would the employer let go a perfectly suitable person, just to hire a younger replacement? Without explanation, there is logical room to suspect illegal bias. But in the absence of a chain of events which at least to

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[5] Throughout the proceedings below, Gaworski has attached misplaced significance to a semantic distinction between the characterization "lay off" and "replacement". The Court of Appeals succumbed to this thinking. The distinction is irrelevant to the point ITT offers here, except, perhaps, to underscore the pitfall of too mechanistic an application of the McDonnell Douglas formula. The fact of an absolute, permanent overall reduction in the size of the relevant CRG workforce here at the time of the termination of Gaworski's employment was undisputable and, therefore, was expressly stipulated in this case. That fact drives the analysis ITT is advancing, regardless of what proportion of Gaworski's former duties were reassigned after his termination to Olker or whether, as a result of this reassignment, it is appropriate to characterize Olker as Gaworski's "replacement".

this extent draws attention to age as a reasonably suspect basis for selection, the mere unremarkable fact that some retained employees happen to be younger than one of those laid off does not create a basis for logical inference of wrongdoing -- does not prove a prima facie case of age discrimination.

The law has long recognized as black letter the fundamental proposition that the mere fact that a person who is disappointed with an employment decision happens to be a member of a protected class does not position that person with a prima facie claim of illegal discrimination. Surely that proposition cannot be inverted every time the beneficiary of the contested decision is a different race, gender, age, religion, or national origin and the complaining party is able to question the wisdom or accuracy of the decision-maker's business reasoning, still without any proof tying the decision to roots in the prohibited discrimination. Even more compelling is the notion central to this appeal: that no basis for inference of age discrimination arises from layoff selections which, by definition, reallocate given work among fewer people, some of whom invariably will be younger than the oldest of those laid off.

The core concept of indirect methods of proof of intentional employment discrimination has to be demonstration of some chain of events, scenario or set of circumstances which, before credible explanation, gives rise to a reasonable inference of prohibited discrimination. Something at least initially incongruous, illogical or suspicion-provoking must be shown by the evidence. Otherwise, the basic focus on illegal discrimination will inevitably be perverted to potential courthouse arbitration of virtually every work place grievance involving competition between nonidentical contenders for scarce employment opportunity.

B. Gaworski Did Not Establish Age Discrimination Vel Non.

Once an employer comes forward with a legitimate business explanation of its conduct, any presumption arising from McDonnell Douglas is rebutted and "drops from the case." Burdine, 450 U.S. at 254 n.7. Unquestionably, that happened here. As a result, the role of a reviewing court was to search for a substantial basis for a reasonable inference of discrimination, without resort to illogical, artificial or continued presumptions or formulae. The Court of Appeals failed to heed this mission by focusing too narrowly only on disputes that had no bearing on the key question of age discrimination.

First, the Court of Appeals found a basis for the inference that age determined the selection of Gaworski for layoff from evidence suggesting that the admitted workforce reduction may not have been necessary. Gaworski, 17 F.3d at 1109-10. However, as the dissent elaborates, that evidence went no farther than to pit short-term profitability against the longer term implications of liquidating revenue generating assets. Id. at 1118-19. The fact of the reduction was stipulated. Not even Gaworski contended that ITT reduced CRG's employee complement by 23%, adversely affecting persons outside the protected class in every case but Gaworski's own, for reasons of age. ITT was surely free to decide for itself whether, despite short-term profits earned from selling large chunks of its revenue-generating loan portfolio, the undisputed drop in overall loan volume and new loan origination called for reducing the number of loan processing employees.

Second, the Court of Appeals concluded that the jury's verdict of age discrimination was supported by evidence which it found cast in doubt the accuracy and, therefore, **automatically**, the believability of Guimbarda's explanation

for his decision to retain Olker rather than Gaworski. Id. at 1110. If existing law is to be given effect, mere disagreement with a business judgment cannot impel a verdict of discrimination. Yet the Court of Appeals' analysis does just that. Juxtaposing earlier performance criticisms of Gaworski as sometimes failing to maintain the broad perspective appropriate to his senior management position with Guimbarda's later expression of preference for one with greater and more recent "hands-on" credit analysis and loan work-up experience, and stressing Gaworski's admittedly deeper supervisory experience, the Court of Appeals fundamentally misses the crucial point: wisely or stupidly, Guimbarda said he preferred a "player" more than a life-long "coach" for the new "player-coach" position appropriate to the new, sharply reduced CRG organization. See id. Guimbarda further explained that his choice was clearer in view of the comfort he received from retaining Olker's unquestioned ability to maintain and modify as necessary the computer system on which the group depended. The fact, emphasized by the Court of Appeals majority, that subsequent events did not present the hazards against which Guimbarda sought to be protected, see id., proves nothing to discredit the reality (or even, for that matter, the wisdom) of Guimbarda's apprehensions, much less to prove that Gaworski's age ever entered his thinking.

Why should all of this concern the Supreme Court of this land? Because exactly this kind of evidentiary contest presently threatens to turn virtually every contested layoff, discipline, and discharge decision in this country into a rudderless, costly excursion into publicly refereed conflict, all in the name of "pretext" as a code word for arguably erroneous business judgment.

At most, Gaworski proved that he could have performed the duties given to Olker and that another employer might

have chosen to retain him and to lay off Olker. This cannot, as a matter of law, support the jury's verdict that age determined the choice.

Every day, in virtually every work place, employment opportunities are awarded in competitive situations involving rival candidates. Inevitably, there must be winners and losers. Inevitably, in an ever-increasingly diverse work environment, winners and losers will be distinguishable on the basis of gender, age, and other characteristics which the law protects against discrimination. The mere selection of a younger man over an older woman, an older man over a younger woman, a black man over a white woman, or a white woman over an Hispanic man, does not give rise to an inference that age, race or gender motivated the selection. The mere ability to dispute the business rationale for selection -- nearly always present -- does not alter this conclusion.

The law provides that employers are free to exercise business discretion. The law risks mockery if it also provides that any time business discretion cannot be justified beyond doubt by unimpeachable objective empirical evidence, a jury will be free to second-guess that exercise of discretion and thereby leap to the conclusion of illegal discrimination. There simply is no basis for a verdict of age discrimination when the only evidence at all related to age is the nine year difference in age between the laid off worker and the employee to whom his duties fall in a layoff selection decision. No matter how elusive proof of intentional illegal discrimination may be, no matter how liberally the rules of evidence must be applied to afford plaintiffs reasonable opportunity to establish such proof, the law cannot tolerate verdicts necessarily based on speculation.

III. THE COURT OF APPEALS WAS REQUIRED TO GRANT ITT'S MOTION FOR A REHEARING IN BANC.

In 1943, this Court determined that a United States Court of Appeals has the power to hold hearings in banc. Textile Mills Sec. Corp. v. Commissioner of Internal Revenue, 314 U.S. 326 (1943). Five years later, Congress codified this decision when it enacted 28 U.S.C. § 46, which provides:

> Cases and controversies shall be heard and determined by a court or panel of not more than three judges...unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in regular active service. . . .

28 U.S.C. § 46(c). Pursuant to this statute and Textile Mills, this Court then adopted Federal Rule of Appellate Procedure 35, which permits a party to petition a United States Court of Appeals for a rehearing in banc and provides that a rehearing shall be granted when ordered by a "majority of the circuit judges who are in regular active service." Fed. R. App. P. 35(a), (b).

After the Eighth Circuit affirmed the trial court's judgment in this case, ITT petitioned the Court to rehear the matter in banc, pursuant to Rule 35. In response, five of the Eighth Circuit's ten judges voted in favor of a rehearing in banc, three voted against, and two recused themselves. (App. B-D). Despite its having received a favorable response from the majority of judges who voted, however, the Eighth Circuit then proceeded to deny ITT's petition. Id. In so doing, the Eighth Circuit joined with a number of other circuits that interpret Rule 35 and 28 U.S.C. § 46 to permit a rehearing in banc only when an absolute majority of circuit judges vote in

favor of rehearing. See Zahn v. International Paper Co., 469 F.2d 1033, 1040 (2d Cir. 1972), aff'd on other grounds, 414 U.S. 291 (1973); Lewis v. University of Pittsburgh, 725 F.2d 910, 928-29 (3d Cir. 1983) (statement sur petition for rehearing), cert. denied, 469 U.S. 892 (1984); United States v. Nixon, 827 F.2d 1019, 1020-21 (5th Cir. 1987), cert. denied, 484 U.S. 1026 (1988); Clark v. American Broadcasting Cos., 684 F.2d 1208, 1226 (6th Cir. 1982), cert. denied, 460 U.S. 1040 (1983). This interpretation of the statute contradicts the statutes's language, however, and is in conflict with the decisions of a number of other circuits. See Arnold v. Eastern Air Lines, Inc., 712 F.2d 899, 902-06 (4th Cir. 1983), cert. denied, 464 U.S. 1040 (1984); Seventh Circuit Operating Procedure 5 ("A simple majority of the voting active judges is required to grant a rehearing in banc."); Ford Motor Co. v. Federal Truck Comm'n, 673 F.2d 1008, 1012 n.1 (9th Cir. 1981) (Reinhardt, J. dissenting), cert. denied, 459 U.S. 999 (1982). Thus, it should be reversed.

Federal Rule of Appellate Procedure 35 and 28 U.S.C. § 46 both state that a rehearing in banc shall be held when ordered by a majority of "the circuit judges who are in regular active service." 28 U.S.C. § 46(c); Fed. R. App. P. 35(a). The statute goes on to state that a circuit court in banc "shall consist of all circuit judges in regular active service." Because a court in banc cannot include recused judges, see 28 U.S.C. § 455, and because canons of construction require that identical terms within the same statutory section be given identical meanings, e.g., United States v. Nunez, 573 F.2d 769, 771 (2d Cir.), cert. denied, 436 U.S. 930 (1978), the phrase "circuit judges in regular active service" must be understood to mean "circuit judges in regular active service who have not recused themselves in a particular case." Lewis, 725 F.2d at 929-30; see also Arnold, 712 F.2d at 904 (judges who have recused themselves are not "in service"; they are "out of

service"). Thus, it is clear that the Eighth Circuit erred in denying ITT's petition for rehearing when five of the eight judges who voted on the petition voted to grant it.

This Court has addressed this issue in the past and has held that each circuit is "free to devise its own administrative machinery to provide the means whereby a majority may order such a hearing." Shenker v. Baltimore & Ohio R.R. Co., 374 U.S. 1, 5 (1963) (quoting Western Pacific R.R. Corp. v. Western Pacific R.R. Co., 345 U.S. 247, 250 (1953)). That decision, however, has led to the inconsistent application of federal law and "the appearance of rights determined by happenstance." Lewis, 725 F.2d at 930. The capriciousness of the current situation is demonstrated by the fact that, had this case arisen a decade ago, a hearing in banc would have been granted by the Eighth Circuit. See id. n.9 (stating that Eighth Circuit Local Rule 16(a), which is no longer in effect, provided that a rehearing in banc would be granted when ordered by a "majority of the judges . . . who are not disqualified in the particular case or controversy"). The federal courts have called for guidance on this issue. Lewis, 725 F.2d at 930 (stating that "Congress or the Supreme Court should provide guidance at an early occasion"); Zahn, 469 F.2d at 1041 ("The time may well have come for a congressional review of Title 28 U.S.C. § 46(c) . . . ."). This Court should heed that call and grant certiorari.

CONCLUSION

For the foregoing reasons, ITT asks the Court to grant its petition for a writ of certiorari.

Respectfully submitted,

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United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 92-1753

Richard C. Gaworski,	*	
	*	
Plaintiff-Appellee,	*	
	*	
Equal Employment Opportunity Commission,	*	
	*	
Intervenor Plaintiff-Appellee,	*	
	*	
v.	*	Appeals from the United States
	*	District Court for the
ITT Commercial Finance Corp., a Nevada corporation; ITT Financial Corporation, a Delaware corporation; ITT Corporation, a Delaware corporation,	*	District of Minnesota.
	*	
Defendants-Appellants,	*	

No. 92-1840

Richard C. Gaworski,	*
	*
Plaintiff,	*
	*
Equal Employment Opportunity commission,	*
	*
Intervenor Plaintiff Appellant,	*
	*
v.	*
	*
ITT Commercial Finance Corp., a Nevada corporation; ITT Financial corporation, a Delaware corporation; ITT Corporation, a Delaware corporation,	*
	*
Defendants-Appellees.	*

Submitted: May 13, 1993
Filed: March 2, 1994

Before RICHARD S. ARNOLD, Chief Judge, LAY, Senior Circuit Judge, and JOHN R. GIBSON*, Circuit Judge.

LAY, Senior Circuit Judge.

Richard Gaworski and intervenor E.E.O.C. ("plaintiffs") brought an action under the Age Discrimination in Employment Act, 29 U.S. C. § 621 et seq. (1988) ("ADEA" or "Act"),[1] against ITT Commercial Finance Corp., ITT Financial Corp., and ITT Corp. (collectively, "ITT"). Gaworski had been terminated from his position as Manager of Credit and Operations for ITT Commercial Finance Corporation's Capital Resources Group ("CRG"). At the time of his termination, he was fifty-five years old. Following a four-day trial, a jury returned a verdict finding that age had been a determining factor in ITT's discharge of Gaworski. The district court[2] then entered judgment and awarded Gaworski backpay in the amount of $265,892.27. The court denied ITT's post-trial motion for judgment notwithstanding the verdict or a new trial. On appeal, ITT urges that there exists insufficient evidence to support the jury's verdict and that certain additional offsets should have been taken from the backpay award. The E.E.O.C. cross-appeals, challenging the

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* The HONORABLE JOHN R. GIBSON, was circuit judge of the United States Court of Appeals for the Eighth Circuit at the time this case was submitted, and took senior status on January 1, 1994, before the opinion was filed.

[1] The ADEA makes it unlawful, in pertinent part, "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a) (1) (1988).

[2] The Honorable Paul A. Magnuson, United States District Judge for the District of Minnesota.

district court's deduction from the backpay award of unemployment compensation that Gaworski received following his termination. We affirm the judgment on the verdict finding that age was a determining factor in Gaworski's discharge, but reverse in part and remand as to the backpay award.

I. AGE DISCRIMINATION

A. Background

Gaworski came to ITT in 1976 as Comptroller of ITT Industrial Credit. As Comptroller, he was responsible for the company's accounting, budgeting, financial analysis and electronic data processing. He moved to CRG after Industrial Credit merged with Commercial Finance in 1984. Two years later, ITT terminated his employment. At the time of his termination, Gaworski was the oldest and highest paid CRG employee, and he was the only CRG employee eligible to receive a pension. Defendants claim that Gaworski was terminated as part of a "reduction in force" ("RIF") initiated by Michael Guimbarda, the director of the CRG division, and that Gaworski's position was eliminated. Gaworski disputes the employer's reasons for his discharge; he urges that age was the motivating factor in his termination.

At the time of Gaworski's discharge, the number of employees at CRG dropped from seventeen to thirteen. Gaworski argues, however, that the purported RIF was not objectively carried out and that he was included among the employees to be laid off because of his age. To support his claims, Gaworski presented evidence at trial that despite Guimbarda's contention that the RIF was needed, CRG's business was increasing at the time of the layoffs. In addition, Gaworski adduced evidence that in conducting the alleged RIF, Guimbarda failed to comply with a company policy

explicitly requiring "advance written notification to both the senior levels of operating management and the director of personnel" before any layoff could occur.

Gaworski also presented evidence that his position was not eliminated, as Guimbarda claimed, but that instead, he was replaced by a younger man. The day after Gaworski's employment was terminated and his position of "Manager of Credit and Operations" was supposedly eliminated, Guimbarda promoted John Olker, a 46-year-old senior investment manager whom Gaworski had supervised, to the "new" position of "Manager of Credit and Administration." Olker received an $8,000 raise, moved into Gaworski's office, and assumed substantially all of Gaworski's former duties. Gaworski claims that this promotion, too, was conducted in violation of company policy. The policy required a performance review before an employee could be promoted, and Olker had not been given such a review. At the time of Olker's previous performance review, seven months earlier, his performance was evaluated as "standard" (average), while Gaworski had generally been rated as "above standard," and it was recommended that Olker not be reassigned or promoted during the ensuing twelve-month period.

Guimbarda testified that he retained Olker over Gaworski because, although they were both good performers, Olker had greater knowledge of the computer system than Gaworski and had more experience performing actual credit analyses. In response, Gaworski elicited testimony from Olker that it had been necessary for Gaworski to understand credit analysis in order to supervise and direct Olker's and others' performance in this area. Gaworski also argued that he gained a thorough understanding of credit analysis while serving as Comptroller of Industrial Credit. Olker, by contrast, had little, if any, experience supervising credit analysts and had performed his first "solo" credit analysis only four months before the alleged RIF and his promotion. As for the purported need for

computer skills, Gaworski presented evidence that the personnel director had never been informed of this need and that computer skills were not listed on Olker's job description. Moreover, Olker testified that his use of the computer had actually decreased by 50% after his promotion. Gaworski claims that Guimbarda's purported reasons are not credible and are mere pretext for discrimination on the basis of age.

ITT contends that Gaworski has nowhere demonstrated a link between his age and his termination. Gaworski responds, and the district court agreed, that there is substantial evidence to support the jury's verdict. Moreover, the district court specifically rejected ITT's claim in its motion for j.n.o.v. that Gaworski was terminated as part of a RIF, holding that "sufficient evidence was before the jury that Gaworski was replaced by a younger and less compensated employee." The court thus refused to overturn the jury's verdict, leading to this appeal.

B. Discussion

On appeal our task is limited. We must: (1) consider the evidence in the light most favorable to Gaworski; (2) assume that all conflicts in the evidence were resolved by the jury in Gaworski's favor; (3) assume Gaworski proved all the facts his evidence tends to prove; (4) give Gaworski the benefit of all favorable inferences that may reasonably be drawn from the facts proved; and (5) affirm the denial of the motion for judgment as a matter of law if reasonable persons could differ as to the conclusions to be drawn from the evidence. Doyne v. Union Elec. Co., 953 F.2d 447 (8th Cir. 1992). Applying this highly deferential standard, we affirm Judge Magnuson's denial of the motion for judgment as a matter of law.

It is axiomatic that employment discrimination need not be proved by direct evidence, and indeed, that doing so is often impossible, because as the Supreme Court has said,

"[t]here will seldom be 'eyewitness' testimony as to the employer's mental processes." United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 716 (1983). In disparate treatment cases based on circumstantial evidence, courts apply the analytical framework of shifting burdens developed in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), and its progeny.[3] Under this framework, the plaintiff has the burden of establishing a prima facie case of discrimination. Texas Dep't. of Community Affairs v. Burdine, 450 U.S. 248, 252-53 (1981). Once established, the prima facie case raises a legal presumption of discrimination in the plaintiff's favor, requiring the defendant to produce legitimate, nondiscriminatory reasons for its actions. Id. If such reasons are put forth, the plaintiff, who at all times retains the burden of proving discrimination, may attempt to demonstrate that the proffered reasons are pretextual. Id. This framework is designed as a "sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination." Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978). On appeal, our focus is on the "critical question," not on the sufficiency of a party's showing at any particular stage of the McDonnell Douglas analysis. Morgan v. Arkansas Gazette, 897 F.2d 945, 948 (8th Cir. 1990). We are guided, however, by the Supreme Court's most recent refinement of the McDonnell Douglas test in St. Mary's Honor Center v. Hicks, 113 S. Ct. 2742 (1993), which clarifies when the question of discrimination is to be left to the finder of fact and when it may be decided as a matter of law.

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[3] Although McDonnell Douglas was an action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., the McDonnell Douglas framework also applies to claims under the ADEA. E.g., Beshears v. Asbill, 930 F.2d 1348, 1353 n.7 (8th Cir. 1991).

In Hicks, the Supreme Court held that a panel of this Court had erred in concluding that a finding that the employer's proffered nondiscriminatory reasons for its actions were pretextual compelled a judgment as a matter of law for the plaintiff. 113 S. Ct. at 2749. The Court stated that the legal presumption that would justify a judgment as a matter of law based on the plaintiff's prima facie case "simply drops out of the picture" when the defendant articulates a nondiscriminatory explanation. Id. From that point on, whatever the persuasive effect of the defendant's "production," the ultimate question of discrimination is for the finder of fact to decide. Id.

Most relevant to this appeal, the Court in Hicks described the sufficiency of the evidence required to support a factfinder's determination of discrimination:

> The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons, will permit the trier of fact to infer the ultimate fact of intentional discrimination, and the Court of Appeals was correct when it noted that, upon such rejection, '[n]o additional proof of discrimination is required,' 970 F.2d, at 493 (emphasis added).

113 S. Ct. at 2749 (footnote omitted). Thus, if (1) the elements of a prima facie case are present, and (2) there exists sufficient evidence for a reasonable jury to reject the defendant's proffered reasons for its actions, then the evidence is sufficient to allow the jury to determine whether intentional discrimination has occurred, and we are without power to reverse the jury's finding. Id.

In this case, it is clear that the elements of a prima facie case of age discrimination are present. "The burden of establishing a prima facie case of disparate treatment is not onerous." Burdine, 450 U.S. at 253. A plaintiff establishes a prima facie case of age discrimination if she can show that she is a member of the protected age class, that she was performing adequately in her job, that she was fired, and that she was replaced by a younger person after her dismissal. Lowe v. J. B. Hunt Transp., Inc., 963 F. 2d 173 (8th Cir. 1992). Here, plaintiff Gaworski clearly was within the ADEA's "protected class" of those over forty years old. See 29 U.S.C. § 631(a) (1988). His performance reviews and Guimbarda's admission that he was a good worker indicate that he was performing more than adequately. He was terminated from his employment. And contrary to ITT's claims, the evidence supports a finding that he was replaced by a younger employee.

Defendants argue that Gaworski was terminated as part of a reduction in force and that, therefore, under this Court's decision in Holley v. Sanyo Manufacturing, Inc., 771 F.2d 1161 (8th Cir. 1985), he must make an "additional showing" of age-related animus in order to establish his prima facie case. We agree with the district court, however, that the evidence supports a finding that Gaworski's position was filled by a younger employee rather than eliminated after Gaworski was laid off. Viewed in the light most favorable to Gaworski, the evidence shows that the younger Olker was given Gaworski's office, substantially all of Gaworski's former duties, a job description that Olker admits was "fairly comparable" to Gaworski's, and a title almost identical to the one Gaworski had had. Moreover, we have previously stated that RIF plans "generally include objective criteria by which to determine which jobs will be eliminated and often include objective evidence of a business decline." Hillebrand v. M-Tron Indus., Inc., 827 F.2d 363, 367 (8th Cir. 1987), cert. denied, 488 U.S.

1004 (1989). Neither were present here. In fact, Gaworski presented evidence that at the time ITT sought to cut its workforce, business was increasing -- of the $30 million of new loans booked in the year preceding the RIF, $20 million were booked in the final four months before the RIF took place. On this basis, reasonable minds could conclude that Gaworski had, in fact, been replaced and that ITT's purported RIF was a pretextual explanation for his discharge.

Evidence exists to allow reasonable minds to conclude that each of ITT's proffered nondiscriminatory explanations was pretextual. ITT claimed that it retained Olker over Gaworski because Gaworski lacked a substantive understanding of credit analysis, that his skills were, as Guimbarda described at trial, "more administrative in nature." Tr. at 81. Gaworski presented evidence, however, that in December of 1985, Guimbarda had signed a performance review stating that one of Gaworski's weaknesses was that he was too detail oriented and that he should delegate and manage more. Moreover, Gaworski established that in addition to his experience and highly-rated performance at CRG, as Comptroller of ITT Industrial Credit, he had served with the company president and other top-level administrators on ITT's Senior Credit Committee, the "final arbiter" assessing credit analyses conducted by other Industrial Credit employees. Olker, by contrast, had little or no experience supervising analysts, as he was required to do after his promotion. Olker himself testified that it was necessary for Gaworski to understand credit analysis in order to supervise Olker's activities.

ITT also claimed that Olker was more valuable to the company than Gaworski because of his greater computer skills. Guimbarda testified that the "computer experience to me was critical." Tr. at 104. Again, Gaworski presented evidence to the contrary. He demonstrated that the need for computer skills was not mentioned in Olker's new job

description, that the personnel director had never been informed of this need, and that Olker was in fact applying his computer skills much less in the new position than he had before. Moreover, Gaworski elicited testimony from Guimbarda that Guimbarda had never considered teaching Gaworski about the workings of the computer system, even though Gaworski's performance review spoke highly of his ability to grasp new concepts and Guimbarda himself admitted that "it's something I guess that Dick [Gaworski] could have done." Tr. at 83.

"[T]he ADEA is not intended to be used as a means of reviewing the propriety of a business decision . . . . " Jorgensen v. Modern Woodmen of Am., 761 F.2d 502, 505 (8th Cir. 1985). The materially conflicting evidence in this case, however, raises a question of fact as to the believability, not the propriety, of ITT's purported reasons for discharging Gaworski. Viewing the evidence in the light most favorable to Gaworski, we find that the evidence is sufficient to allow a reasonable jury to conclude that ITT's proffered non-discriminatory reasons were "unworthy of credence," see Hazen Paper Co. v. Biggins, 113 S. Ct. 1701, 1708 (1993). A reasonable jury could find that ITT acted for reasons other than what it claimed.

The elements of the plaintiff's prima facie case are thus present and the evidence is sufficient to allow a reasonable jury to reject the defendant's non-discriminatory explanations. The "ultimate question" of discrimination must therefore be left to the trier of fact to decide. See Hicks, 113 S. Ct. at 2749. The jury in this case could reasonably have accepted or rejected the defendant's proffered explanations. By its verdict, it presumably rejected them. Hicks establishes that "[n]o additional proof of discrimination is required." Id. (emphasis added) (citation omitted). Based upon the elements of the plaintiff's prima facie case and the jury's rejection of the

defendant's explanations, the jury could infer that discrimination had occurred. Id.

The jury's finding that ITT intentionally discriminated against Gaworski on the basis of age was within its purview as the finder of fact. We therefore affirm.

II. THE BACKPAY AWARD

In its calculation of backpay to be awarded to Gaworski, the district court relied on the jury's special verdict to calculate the pay Gaworski would have received had he not been wrongfully terminated.[4] From an initial award of $387,523.27, the district court then deducted $109,530.00 in income Gaworski had earned from two other employers in the interim, as well as $12,101.00 Gaworski had collected in unemployment compensation. The court refused to deduct $7,345.00 Gaworski had earned doing free-lance consulting work during the backpay period, determining that this was part-time moonlighting income that he could have earned even if he had remained employed with ITT. The court also refused to deduct $18,061.80 that Gaworski had received from his pension fund during the backpay period, concluding that those payments were from a "collateral source." Finally, the court added $11,625.71 in lost matching contributions to Gaworski's 401(k) plan, $4,151.50 in job search expenses, and $4,467.00

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[4] The parties agreed at trial that Gaworski would not seek back pay beyond April 30, 1991, when CRG went out of business. They also agreed that the only relief issue they would submit to the jury was the size of the raises Gaworski would have received each year and that all other relief issues would be submitted to the court after trial. The jury determined that if Gaworski had remained employed with ITT until April, 1991, he would have received an annual raise on December 1st of each year, amounting to 5.5% in December, 1986, 5.0% in December, 1987, and 4.0% for each of the last three years.

in replacement insurance premiums, to reach a grand total of $286,136.48.[5]

Defendants argue on appeal that the court should not have included the 401(k) contributions and the insurance expenses and should have deducted the consulting income and pension payments. Cross-appellant E.E.O.C. argues that the unemployment expenses should not have been deducted. We agree with defendants that the pension payments should have been deducted, and with the E.E.O.C. that the unemployment compensation should not have been deducted. We affirm as to the other possible offsets and additions.

A. ITT's Claimed Offsets

1. Insurance Expenses and 401(k) Contributions

ITT urges that the district court should not have added insurance expenses or 401(k) contributions to Gaworski's backpay award, because the claimed losses were not supported by evidence admitted at trial. Our review of the record, however, shows that Gaworski did testify that he paid "about $4,000" to replace the life and disability insurance that had previously been paid by ITT. Tr. at 278-79. More important, the record shows that the parties understood that the record would be left open after the jury trial for submission to the court of material relevant to the determination of damages.[6] Based on the agreement, Gaworski submitted to

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[5] The court also awarded prejudgment interest and attorneys' fees.

[6] Parties to a jury trial may agree to leave particular issues for resolution by the trial court, see Fed. R. Civ. P. 39(a), and we see no reason to disturb the parties' agreement here. See Graefenhain v. Pabst Brewing Co., 870 F.2d 1198, 1206 (7th Cir. 1989) (stating that stipulation to have damages issues resolved by court is binding "unless relief from the stipulation is necessary to prevent a 'manifest injustice' or

the court copies of the checks he wrote to pay his insurance premiums. He also made a representation to the court, not disputed by ITT, that ITT had regularly made matching contributions of 3% of Gaworski's salary to his 401(k) savings plan. On this basis, it was not clearly erroneous for the court to add the $4,467 in insurance costs, see Tolan v. Levi Strauss & Co., 867 F.2d 467 (8th Cir. 1989), or the $11,625.71 in lost 401(k) contributions to Gaworski's backpay award. Both amounts serve to restore Gaworski to the position he would have been in but for his discriminatory discharge.

2. Self-Employment Income

Second, ITT challenges the district court's refusal to deduct the $7,345 Gaworski earned from his self-employment as a consultant, claiming that it is mitigation income that must be offset against an award of backpay. The district court found that the money was "moonlighting" income that Gaworski could have earned even if he had remained employed with ITT. It is not error for a court to refuse to deduct moonlighting income from an award of backpay. Behlar v. Smith, 719 F.2d 950, 954 (8th Cir. 1983) (per curiam), cert. denied, 466 U.S. 958 (1984). ITT had the burden of proving that Gaworski could not have earned the income had he not been terminated. See DiSalvo v. Chamber of Commerce, 568 F.2d 593, 598 (8th Cir. 1978). Our review of the record fails to convince us that the district court's finding was clearly erroneous.

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the stipulation was entered into through inadvertence or based on an erroneous view of the facts or law").

3. Pension Fund

Finally, ITT argues that the district court should have deducted $18,061.80 that Gaworski collected from his pension fund after his termination. Gaworski and ITT stipulated at trial that Gaworski would not oppose deducting the pension payments from the backpay and ITT would agree to calculate Gaworski's future pension payments as if he had continued working at ITT until 1991 and had never withdrawn any of the earlier amounts. Tr. at 236-37. Gaworski's position changed only in a letter brief regarding damages issues written to the district court after the jury trial. In his appellate brief, Gaworski does not mention the pension payments, and the E.E.O.C., relying on Gaworski's earlier stipulation, does not oppose ITT on this point.

We agree with ITT that Gaworski should be bound by his earlier stipulation. In Consolidated Grain & Barge Co. v. Archway Fleeting & Harbor Service, Inc., 712 F. 2d 1287 (8th Cir. 1983) (per curiam), we held that the district court had erred in failing to follow the parties' stipulation regarding interest to be awarded in the event liability were found. There, as here, there was "no showing that either party sought relief from the stipulation in district court, or that the district court on its own motion considered and rejected the stipulation." Id. at 1290. Indeed, the district court here explicitly relied on part of the stipulation to order that the defendants pay the pension benefits Gaworski would have received had he not been terminated, including those benefits that would have accrued had he been employed until 1991. The court erred in not enforcing both sides of the parties' bargain. Consequently, Gaworski's backpay award should be reduced by the sum of $18,061.80.[7]

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[7] In Doyne v. Union Electric Co., 953 F.2d 447 (8th Cir. 1992), a panel of this Court held that it was error for the district court to deduct pension payments from a plaintiff's ADEA back- and frontpay awards,

B. The Cross-Appeal: Unemployment Compensation

The district court deducted $12,101.00 Gaworski received in unemployment compensation after his termination because, in the court's view, "[t]o allow Gaworski to receive unemployment compensation as well as the back pay would provide double recovery." We reverse.

It is fundamental that "an employer can not set up in mitigation of damages in a tort action by an injured employee indemnity from a collateral source, such as insurance or compensation or benefits under a Workmen's Compensation Act, even where the defendant has contributed to the fund." Chicago Great W. Ry. v. Peeler, 140 F.2d 865, 868 (8th Cir. 1944). This "collateral source rule" has a long pedigree, but it remains applicable and gains in significance in the context of employment discrimination claims. As we noted in Beshears v. Asbill, 930 F.2d 1348 (8th Cir. 1991), because of the collateral source rule, "'[m]ost courts have refused to deduct such benefits as social security and unemployment compensation from ADEA awards,'" id. at 1355 n.11 (quoting Guthrie v. J.C. Penney Co., 803 F.2d 202, 209 (5th Cir.

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because the payments were from a collateral source--an ERISA pension fund. The court analogized to Clark v. Burlington Northern, Inc., 726 F.2d 448 (8th Cir. 1984), a FELA case where we stated that "fringe benefit programs, such as medical and hospital insurance and retirement pensions that are offered as partial consideration for employment, cannot be set off against an FELA judgment." In Glover v. McDonnell Douglas Corp., 981 F.2d 388, 396-97 (8th Cir. 1992), vacated on other grounds, 114 S. Ct. 42 (1993), original position adhered to on remand, 1994 WL 2788 (8th Cir. 1994), however, a different panel rejected the collateral source rule and held, without reference to Doyne or Clark, that the district court erred in refusing to offset pension benefits from an award of backpay. Because we dispose of the issue here based on the parties' stipulation at trial, we do not address the possible conflict among our cases.

1986)). Such a refusal is sensible and in accordance with the purposes of the ADEA.

Backpay awards in discrimination cases serve two functions: they make victimized employees whole for the injuries suffered as a result of the past discrimination, and they deter future discrimination. Albemarle Paper Co. v. Moody, 422 U.S. 405, 421 (1975); see Gibson v. Mohawk Rubber Co., 695 F.2d 1093, 1097 (8th Cir. 1982) (noting that ADEA remedies aim "to eliminate the unlawful practices and to restore aggrieved persons to the position where they would have been if the illegal discrimination had not occurred"). The Supreme Court in Albemarle emphasized the importance of the deterrence function, saying:

> It is the reasonably certain prospect of a backpay award that "provide[s] the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history."

422 U.S. at 417-18 (quoting United States v. N.L. Indus. Inc., 479 F. 2d 354, 379 (8th Cir. 1973)).[8] Reducing a backpay award by unemployment benefits paid to the employee, not by the employer, but by a state agency, see NLRB v. Gullett Gin Co., 340 U.S. 361, 364 (1951), makes it less costly for the

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[8] Albemarle was a Title VII case, but these principles apply more strongly to cases under the ADEA. Although the goal of both statutes is to eliminate discrimination in the workplace, backpay is discretionary under Title VII, while it is mandatory under the ADEA--and thus a more fundamental part of the remedial scheme. See Lorillard v. Pons, 434 U.S. 575, 584 (1978); McDowell v. Avtex Fibers, Inc., 740 F.2d 214, 217 (3d Cir. 1984), vacated & remanded on other grounds, 469 U.S. 1202 (1985).

employer to wrongfully terminate a protected employee and thus dilutes the prophylactic purposes of a backpay award. See Craig v. Y & Y Snacks, Inc., 721 F.2d 77, 84 (3d Cir. 1983); E.E.O.C. v. Ford Motor Co., 645 F.2d 183, 196 (4th Cir. 1981), rev'd & remanded on other grounds, 458 U.S. 219 (1982). Indeed, it leads to a windfall to the employer who committed the illegal discrimination. Hunter v. Allis-Chalmers Corp., 797 F.2d 1417, 1429 (7th Cir. 1986); E.E.O.C. v. Sandia Corp., 639 F.2d 600, 626 (10th Cir. 1980). By virtue of state aid provided "to carry out a policy of social betterment for the benefit of the entire state," and not "to discharge any liability or obligation" of the employer, Gullett Gin, 340 U.S. at 364, the employer winds up paying less to the employee than it would have had it not illegally terminated him.[9]

Based on these considerations, no circuit that has considered the matter has determined that unemployment benefits should, as a general rule, be deducted from backpay awards in discrimination cases. Circuits have split, however, over whether deducting unemployment benefits should be prohibited or should be left to the discretion of the trial court. The majority have held that, as a matter of law, unemployment benefits should not be deducted from backpay awards. See Craig, 721 F.2d at 85; Rasimas v. Michigan Dep't of Mental Health, 714 F. 2d 614, 627-28 (6th Cir. 1983), cert. denied, 466 U.S. 950 (1984); Kauffman v. Sidereal Corp., 695 F.2d 343, 346-47 (9th Cir. 1982) (per curiam); E.E.O.C. v. Ford

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[9] Absent "willful" violations, which lead to an award of liquidated damages, awards under the ADEA are not punitive in nature. See Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 125-28 (1985); Williams v. Valentec Kisco, Inc., 964 F. 2d 723 (8th Cir.), cert. denied, 113 S. Ct. 635 (1992). The jury in this case determined that ITT's violations were not willful. At issue, however, is whether the employer should wind up in a better position by discriminating than it would have had it not illegally discharged the plaintiff.

Motor Co., 645 F.2d 183, 196 (4th Cir. 1981), rev'd & remanded on other grounds., 458 U.S. 219 (1982), original position adhered to on remand, 688 F.2d 951, 952 (4th Cir. 1982) (per curiam); Brown v. A.J. Gerrard Mfg. Co., 715 F.2d 1549, 1550-51 (11th Cir. 1983) (en banc) (per curiam). Three circuits have adopted a minority position that deducting unemployment benefits lies within the discretion of the trial court. See Cooper v. Asplundh Tree Expert Co., 836 F. 2d 1544, 1555 (10th Cir. 1988); Hunter, 797 F. 2d at 1429 (Posner, J., acknowledging discretion as Seventh Circuit rule but stating that it "may be unduly favorable to defendants"); Marshall v. Goodyear Tire & Rubber Co., 554 F.2d 730, 736 (5th Cir. 1977). The Second Circuit has in the past affirmed a deduction of unemployment benefits as discretionary, see E.E.O.C. v. Enterprise Assoc. Steamfitters Local 638 of U.A., 542 F.2d 579, 592 (2d Cir. 1976), cert. denied, 430 U.S. 911 (1977), but more recently indicated that the circuit's rule remains unsettled, see Promisel v. First Am. Artificial Flowers, 943 F.2d 251, 258 (2d Cir. 1991), cert. denied, 112 S. Ct. 939 (1992).

Because we believe the majority rule is the more sound position, we hold that unemployment benefits should not be deducted from awards of backpay under the ADEA. Unemployment benefits are collateral source payments that cannot be termed even "partial consideration" for employment. Gullett Gin, 340 U.S. at 364. We believe that no employer should benefit because of the state's beneficence in providing for one of the employer's illegally discharged employees. If Gaworski's award is to be reduced, it should be the state that seeks to recoup the benefits it paid out.[10] Accordingly, we

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[10] We note that Minnesota, Gaworski's domicile, appears to have a procedure in place for handling backpay awards covering certain periods for which unemployment compensation was paid. See Minn. Stat. §§ 268.08 Subd. 3a, 268.18 Subd. 1 (1992).

reverse this aspect of the district court's decision and find that Gaworski's backpay award should be increased by $12,101.00.

III. CONCLUSION

Based on the foregoing analysis, the judgment on the jury verdict finding the defendants liable for violating the ADEA is affirmed. The backpay award of $265,892.27 is reduced by $18,061.80 to reflect the parties' stipulation regarding pension payments and increased by $12,101.00 received by Gaworski as unemployment compensation. We remand for entry of a new award consistent with this opinion.

JOHN R. GIBSON, Senior Circuit Judge, dissenting.

I respectfully dissent because I conclude that no reasonable jury could have determined that ITT terminated Gaworski because of his age, and therefore, I would reverse the judgment of the district court.

The court today concludes that it must affirm the jury's verdict because Gaworski established a prima facie case of discrimination and there is sufficient evidence from which the jury could reject ITT's explanation for Gaworski's termination. I disagree with the court's analysis of the evidence and its interpretation of the Supreme Court's most recent decision dealing with discrimination, St. Mary's Honor Center v. Hicks, 113 S. Ct. 2742 (1993). The reasoning of both Justice Scalia's opinion for the Court and Justice Souter's dissent in Hicks revolved around the Supreme Court's earlier decisions in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), and Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981). The Court particularly focused on the allocation of the burdens of production required by those cases. The Court stated that once a plaintiff establishes a prima facie case of discrimination, the defendant's failure to introduce evidence

of a non-discriminatory reason will cause judgment to go against it "*unless* the plaintiff's prima facie case is held to be inadequate in law or fails to convince the factfinder." Hicks, 113 S. Ct. at 2749 n.3 (emphasis in original). This practical coercion "causes the McDonnell Douglas presumption to function as a means of 'arranging the presentation of evidence.'" Id. (quoting Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 986 (1988)). Both Justices Scalia and Souter acknowledged that at all times the plaintiff has the burden to demonstrate the ultimate fact of intentional discrimination. 113 S. Ct. at 2747, 2760.

Justice Scalia's opinion for the Court makes clear that the burden of production "precedes the credibility-assessment stage." Id. at 2748 (emphasis in original). The Court states: "At the close of the defendant's case, the court is asked to decide whether an issue of fact remains for the trier of fact to determine." Id. The Court explained that it would be required to award judgment to the employee as a matter of law if the employee established a prima facie case of discrimination and the employer failed to meet its burden of producing a non-discriminatory reason for its action. Id. The Court explained further that if the employer failed to sustain its burden of producing a non-discriminatory reason for its action, but reasonable minds could differ as to whether the employee established a prima facie case, a question of fact remained for determination. Id.

The Court then considered the situation in which an employer had carried its burden of production by articulating a non-discriminatory justification for its action. Id. at 2749. The Court stated: "The McDonnell Douglas framework--with its presumptions and burdens--is no longer relevant," and "[t]he presumption, having fulfilled its role of forcing the defendant to come forward with some response, simply drops out of the picture." Id. at 2749 (citing Burdine, 450 U.S. at

255).[11] Hicks then looked to United States Postal Service Board of Governors v. Aikens, 460 U.S. 711, 715-16 (1983), and concluded that after the close of evidence, the district court's inquiry is limited to considering the ultimate issue of whether the defendant intentionally discriminated against the plaintiff, rather than considering the several steps in the shifting burdens. Hicks, 113 S. Ct. at 2754.

Thus, the lesson from Hicks is that whether there is a factual issue for determination must be decided at the close of the defendant's case. At that point, the district court must decide whether the plaintiff has presented sufficient evidence to establish the ultimate fact of intentional discrimination.

This is the approach we have taken in a number of our earlier decisions. We have held that our task on appeal is limited, and that we will not assess the adequacy of a party's showing at any particular stage of the McDonnell Douglas analysis. Aikens, 460 U.S. at 714-15; Morgan v. Arkansas Gazette, 897 F.2d 945, 948 (8th Cir. 1990); Kientzy v. McDonnell Douglas Corp., 990 F. 2d 1051, 1056 (8th Cir. 1993). See Maness v. Star-Kist Foods, Inc., 7 F.3d 704, 707-08 (8th Cir. 1993) (following Aikens and Hicks and holding the Burdine analysis irrelevant). Thus, we focus our attention on "the ultimate factual issue of whether [the employer] intentionally discriminated against [the employee]," and study the record to determine whether the evidence was sufficient to support the verdict. Aikens, 460 U.S. at 714-15; Morgan, 897 F.2d at 948-49; Kientzy, 990 F.2d at 1056.

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[11] Burdine explains that if the employer meets its burden of articulating a non-discriminatory reason for its action, "the factual inquiry proceeds to a new level of specificity. . . . [T]he plaintiff will have a full and fair opportunity to demonstrate pretext," and the retained burden of persuasion "merges with the ultimate burden of persuading the court that [he] has been the victim of intentional discrimination." 450 U.S. at 255-56. See Hicks, 113 S. Ct. at 2752, 2760-61.

The court's analysis starts with language from Hicks that the factfinder's disbelief of the reasons put forward by the employer may, together with the elements of the prima facie case, suffice to show intentional discrimination and that rejection of the employer's proffered reason for discharge will permit the trier of fact to infer the ultimate fact of intentional discrimination, and that no additional proof of discrimination is required. Supra at 7 (citing Hicks, 113 S. Ct. at 2749). The shortcoming of the court's analysis is that here we have no clear expression of disbelief or rejection of ITT's proffered reasons by the jury, but at most, evidence upon which the jury could have rejected ITT's reasons for discharge.

This case points up the inexact fit of the McDonnell Douglas Burdine standard as restated by Hicks to a case submitted to a jury. The court instructed the jury in this case as to the elements of the prima facie case, and that it must find that age was a determining factor in ITT's decision to discharge Gaworski. The court instructed the jury most generally that ITT denied that it discriminated against Gaworski because of his age. After explaining to the jury that Gaworski could prove age discrimination in a "variety of ways," the court instructed that Gaworski could prove age discrimination by meeting his burden of proving that the reasons offered by ITT for his discharge were "arranged to accomplish discrimination" against him or designed as a coverup. The instruction did not state ITT's proffered reasons for Gaworski's discharge or require that the jury reject ITT's reasons. The court submitted the case to the jury using a special verdict form, asking the jury only whether it found that age was the determining factor in Gaworski's termination, and if so, what percentage in compensation Gaworski would have received if he had continued his employment.

These most general findings do not show that the jury rejected or disbelieved ITT's proffered reasons. Indeed, the instructions did not require that the jury reject or disbelieve

ITT's proffered reasons in order to find age discrimination. Thus, in place of the rejection or disbelief required by Hicks to create an inference of age discrimination, we have only the court's inference of such a finding. From this inference, the court then assumes the ultimate inference of age discrimination. It is a fundamental principle that an inference will not support an inference. The court's analysis simply fails at this point.

It is also significant that two of the recent opinions of courts of appeals, LeBlanc v. Great American Insurance Company, 6 F.3d 836 (1st Cir. 1993), and Anderson v. Baxter Healthcare Corporation, No. 92-3482, 1994 U.S. App. LEXIS 437 (7th Cir. Jan. 11, 1994), both start their analysis with the same passage from Hicks that the court relies on today. LeBlanc, 6 F.3d at 842-43; Anderson, at *8-11. Both courts sustained summary judgments in favor of the employer. The court in LeBlanc concluded that there was no direct or circumstantial evidence of discriminatory animus on the part of the employer. 6 F.3d at 845. LeBlanc stressed the fact that once the employer articulated non-discriminatory reasons for its action, the presumption of age discrimination raised by the prima facie case vanished. Id. "Left to be decided is whether the evidence, in its entirety, would permit a reasonable fact-finder to infer that Great American's decision to terminate LeBlanc was inspired by age animus." Id. The Seventh Circuit in Anderson engaged in a similar, but more detailed, analysis of the evidence put forward to demonstrate the falsity of the employer's proffered reasons for discharge, and ultimately determined that the evidence was inadequate and that the employee failed to meet the ultimate burden of proving intentional age discrimination. Anderson, at *14-20.

Both LeBlanc and Anderson demonstrate the validity of this court's approach in determining sufficiency of the evidence to support verdicts in age discrimination cases by considering, as the Supreme Court instructed in Aikens, the entire record

to determine if the employee has met his burden of proving the ultimate issue of age discrimination.[12] The shortcoming of the court's approach today is simply that it attempts to elevate the inferences to a greater position than that accorded them, particularly by the explication of the McDonnell Douglas and Burdine standards in Hicks. The court today simply carries the inference arising from the prima facie case a step too far. As Hicks makes clear, the inference of discrimination falls from the case once the employer articulates a non-discriminatory reason for the discharge. The court's creation of an inference that the jury must have rejected ITT's explanation as a basis for continuing the inference does not square with Hicks.

The essence of the court's reasoning is that an inference of discrimination arises from Gaworski's prima facie case, separate and distinct from the mandatory rebuttable

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[12] Anderson and LeBlanc comport in the sense that both courts agree that all of the evidence must be considered in determining whether there is sufficient evidence of age discrimination. Anderson, however, focused on whether sufficient evidence existed to disprove the employers proffered reasons, id. at *6-8, while LeBlanc focused on the sufficiency of all of the evidence to support a finding of discrimination. Insofar as the two cases demonstrate a different interpretation of Hicks, I am more persuaded by the approach of the First Circuit. Indeed, the First Circuit's analysis follows most of the decisions in this circuit. See, e.g., Maness, 7 F.3d at 707-08; Kientzy, 990 F.2d at 1056-60. Lowe v. J.B Hunt Transport, Inc., 963 F.2d 173 (8th Cir. 1992), stated the general proposition that a plaintiff making a prima facie case and presenting evidence which would discredit the employer's justification has a right to go to the trier of fact, but it further emphasized that "[a]fter the case is over and has been appealed, the question is simply whether the evidence . . . was sufficient to justify a reasonable jury in finding discrimination." Id. at 175. Lowe affirmed the district court's directed verdict for the employer, concluding that the employee's attacks on the employer's justification "though not themselves, logically inconsistent with age as a motive, were too weak to justify a rational inference of discrimination when viewed against the undisputed background facts." Id.

presumption. Although the court concedes that the mandatory rebuttable presumption drops from the case, the court insists that the inference of discrimination remains and is sufficient to take Gaworski's case to the jury. Hicks, McDonnell Douglas, and Burdine do not support this reasoning.

The court's reliance on the force of the inference arising from the prima facie case is best answered by the following footnote from Burdine:[13]

> The phrase 'prima facie case' not only may denote the establishment of a legally mandatory, rebuttable presumption, but also may be used by courts to describe the plaintiff's burden of producing enough evidence to permit the trier of the fact to infer the fact at issue. 9 J. Wigmore, Evidence § 2494 (3d ed. 1940). McDonnell Douglas should have made it

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[13] Burdine also cites a number of treatises discussing the roles of the presumption created by a prima facie case. 450 U.S. at 255 n.8, 10, including J. Thayer, Preliminary Treatise on Evidence 346 (1898), which states:

> It is one of the commonest of errors to misapprehend the scope and limitations of the ordinary rules and maxims of presumption; and to attribute to them a mistaken quality and force. They are, as we have seen, merely *prima facie* precepts; and they presuppose only certain specific and expressed facts. The addition of other facts, if they be such as have evidential bearing, may make the presumption inapplicable. All is then turned into an ordinary question of evidence, and the two or three general facts presupposed in the rule of presumption take their place with the rest, and operate, with their own natural force, as a part of the total mass of probative matter. Of course the considerations which have made these two or three facts the subject of a rule of presumption may still operate, or may not, to emphasize their quality as evidence; but the main point to observe is, that the rule of presumption has vanished.

apparent that in the Title VII context we use 'Prima facie case' in the former sense.

450 U.S. at 254 n.7.

The Court made clear in Burdine that if the employer meets its burden of producing a non-discriminatory reason for its action, the mandatory presumption is rebutted and drops from the case. Both the majority and dissenting opinion in Hicks clearly recognize this. Justice Scalia comments that at this point the McDonnell Douglas framework--with its presumptions and burdens--is no longer relevant and to resurrect it would be contradictory to Burdine. Hicks, 113 S. Ct. at 2749. In his dissent, Justice Souter states that everyone agrees that the mandatory presumption is not resurrected. Id. at 2759 n.2.

Thus, the issue before us is whether there was sufficient evidence to support an inference of age discrimination. I reject the court's proposition that the inference from the prima facie case has continuing preemptive force. There is no doubt that once the presumption drops from the case, the evidence introduced to establish a prima facie case and "inferences properly drawn therefrom," may be considered in determining whether the employer's explanation is pretextual. Burdine, 450 U.S. at 255 n.10. Justice Souter specifically referred to this note in his dissent, Hicks, 113 S. Ct. at 2759, but it is evident that both Justice Souter in his dissent and the Court in Burdine are discussing the consideration of evidence, not the continuing existence of an independent inference of discrimination. This discussion will not carry the baggage the court attempts to place upon it.

The court concludes that the jury could have inferred age discrimination from evidence that: (1) ITT presented no evidence of the need for a reduction in workforce; (2) ITT's policies did not support Gaworski's termination or Olker's

promotion; (3) Gaworski was the oldest, highest paid, and only "pension eligible" employee at Capital Resources; and (4) ITT's reasons for retaining Olker, a younger employee, were pretextual--Gaworski's job was not really eliminated, Olker replaced him, and Gaworski was more qualified for the position.

None of these facts support an inference of age discrimination. The court today accepts Gaworski's argument that it may infer age discrimination based on ITT's lack of evidence about a need for a reduction in force or any objective plan for implementing a reduction. Whether Guimbarda's decision to reduce Capital Resources' workforce was a sound business decision, however, is irrelevant to our question of whether Gaworski was terminated because of his age. It is well-established that "the ADEA is not intended to be used as a means of reviewing the propriety" of an employer's business decision. Jorgensen v. Modern Woodmen of Am., 761 F.2d 502, 505 (8th Cir. 1985) (discussing a company's decision to split an employee's sales territory); see Neufeld v. Searle Labs., 884 F. 2d 335, 340 (8th Cir. 1989); Bell v. Gas Serv. Co., 778 F. 2d 512, 515 (8th Cir. 1985); see generally Walker v. AT&T Technologies, 995 F.2d 846 (8th Cir. 1993).

Although we have sometimes found that an employer's "reduction in force" may have been a ruse to mask intentional age discrimination, see, e.g., Hillebrand v. M-Tron Indus., Inc., 827 F.2d 363 (8th Cir. 1987),[14] cert. denied, 488 U.S.

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[14] In Hillebrand, we considered whether the plaintiff had established a prima facie case of discrimination sufficient to move beyond summary judgment. 827 F.2d at 366-68. We specifically limited our decision to determining whether the district court erred in concluding that the employee had not established a prima facie case of age discrimination. Id. at 367. We did not decide whether the employee had presented sufficient evidence to ultimately prove that age had been a determining factor in the employer's decision. See Hicks, 113 S. Ct. at 2754. This case, however, has gone beyond the summary judgment stage and whether Gaworski established a prima facie case is no longer relevant.

1004 (1989), Gaworski's own testimony shows that is not the case here. First, Gaworski testified that he was not accusing Guimbarda of laying off five people just to make sure he was laid off, and Gaworski's counsel's opening statement and closing argument emphasized that there was no question that Capital Resources' business had taken a downward turn. Second, Guimbarda laid off four out of seventeen total employees in his division for a twenty-three percent reduction, and Gaworski stipulated that Capital Resources never again employed more individuals than it had remaining after the reduction in force. Moreover, there was unrefuted testimony that although Capital Resources had increased profits preceding the layoff, these profits were driven by the liquidation of loans,[15] and that without new business volume there was a decreased prospect for future revenues.[16] There was also unrefuted testimony that there was reduced loan processing prior to the layoff, and that reduced loan processing meant reduced demand for loan processing jobs like Gaworski's. Gaworski admitted that the total number of loans generating income had been shrinking in the year preceding his termination. Moreover, if the court creates an inference of discrimination from evidence that ITT's business was actually increasing, the court must address ITT's complaint that the district court erred in refusing evidence that

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We must determine whether Gaworski carried his burden of proving that he was laid off because of his age. Id.

[15] Guimbarda explained the profits as a direct result of the shrinkage of the portfolio through the recapture of loss reserves, prepayment penalties, and the gain on the sale of lease assets.

[16] Guimbarda stated that Capital Resources made money by obtaining new loans, managing the existing portfolio of loans and leases, and collecting interest and lease payments. Guimbarda explained that "if your total pool of loans and leases are shrinking, then you are likely to be earning less in the future than you are currently earning."

Capital Resources eventually closed, and that all employees, including Olker, were laid off. The court's statement that "reasonable minds could conclude that Gaworski had, in fact, been replaced and that ITT's purported reduction in force was a pretextual explanation for his discharge" contradicts the evidence in this case, including Gaworski's own admission. I conclude that no reasonable juror could have found that Guimbarda reduced the workforce as a means to discriminate against Gaworski because of his age.

Along this same line, the court accepts Gaworski's argument that Guimbarda's failure to follow ITT's written policies regarding the layoff and promotion of Olker is evidence from which a jury could infer age discrimination. The ITT termination policy provides that no layoff may occur without advance written notification to senior levels of operating management and the director of personnel. Robert Tate, the director of personnel, testified that Guimbarda "technically" violated the policy by giving Tate verbal, instead of written, notification. Guimbarda's failure to comply with an administrative requirement, however, is not enough to infer that age was a determining factor in his decision to terminate Gaworski. Guimbarda notified Tate of the reduction, indeed, Tate traveled to Guimbarda's division to assist with the reduction in force. As we observed earlier, even Gaworski stopped short of accusing Guimbarda of laying off five people just so he could terminate Gaworski because of his age. Likewise, although certain procedures may apply in normal promotional decisions, the failure to "formally" review Olker's performance before adding most of Gaworski's former duties to Olker's job is not evidence that age influenced Guimbarda's decision to terminate Gaworski.

The court also concludes that the jury could have inferred age discrimination because Gaworski was the oldest, highest paid, and only "pension eligible" employee at Capital Resources. A unanimous Supreme Court recently held that an

employer does not violate the ADEA by acting on the basis of a factor, such as an employee's pension status or seniority, that is empirically correlated with age. Hazen Paper Co. v. Biggins, 113 S. Ct. 1701, 1705 (1993).[17]

The Court reiterated that liability in a disparate treatment case "depends on whether the protected trait (under the ADEA, age) actually motivated the employer's decision." Id. at 1706; see Aikens, 460 U.S. at 716. The Court observed that an employer may be liable when it relies on a formal, facially discriminatory policy requiring adverse treatment of employees with the protected trait, or when it is motivated by the protected trait on an informal, ad hoc basis. Hazen Paper, 113 S. Ct. at 1706. Nevertheless, the Court emphasized that "[w]hatever the employer's decisionmaking process, a disparate treatment claim cannot succeed unless the employee's protected trait actually played a role in that process and had a determinative influence on the outcome." Id. Thus, the Court concluded that "an employer does not violate the ADEA just by interfering with an older employee's pension benefits that would have vested by virtue of the employee's years of service." Id. at 1707-08. The Court cautioned, however, that an employer who "targets employees" with a particular pension status on the assumption that those employees are likely to be older engages in age discrimination. Id. In that situation, pension status (or in a similar situation, another empirically correlated factor) may be a "proxy" for age in the sense that an employer may suppose a correlation between the two factors and act accordingly, but not in the sense that the ADEA makes the two factors equivalent. Id. (rejecting Metz v. Transit Mix, Inc., 828 F.2d 1202, 1208 (7th

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[17] The Court recognized the Circuits' disagreement regarding various empirically correlated factors, including pension benefits, salary, and seniority. Hazen Paper, 113 S. Ct. at 1705.

Cir. 1987), which interpreted "proxy" to mean statutory equivalence).

The court today also finds evidence of age discrimination from the fact that Gaworski was the oldest employee. Although the ADEA prohibits age-based employment decisions, it does not confer special rights on an employee who happens to be the "oldest" in a company or division. Thus, we should not infer age discrimination from the simple fact that Gaworski happened to be the oldest in the division. See Hicks, 113 S. Ct. at 2747. Without more than evidence of status in the protected class, the ADEA does not impose liability. The evidence here does not suggest that Guimbarda supposed a correlation" between Gaworski's age and his status as the "oldest" employee and acted accordingly. See Hazen Paper, 113 S. Ct. at 1707. Indeed, none of the other laid off employees was within the protected class, and Olker (age 46), was also in the protected class.

Next, even assuming Guimbarda laid off Gaworski because he had the highest salary, there is still no evidence that Gaworski's age prompted that decision. An analytical framework similar to that used in Hazen Paper can be applied to salary levels: A younger employee, outside the protected class, may have spent his entire career with one employer and worked his way up the ranks to obtain a higher salary than a newly hired older worker. The Supreme Court rejected the Seventh Circuit's decision in Metz, 828 F.2d at 1208, which held that terminating an employee for having a higher salary may be a "proxy" for age discrimination, meaning the statutory equivalent of age discrimination.[18] Hazen Paper, 113 S. Ct. at

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[18] The Seventh Circuit looked to part of our analysis in Leftwich v. Harris-Stowe State College, 702 F.2d 686, 691 (8th Cir. 1983), to support its conclusions. See Metz, 828 F.2d at 1206-07. We express no opinion regarding Leftwich, however, as it involved allegations of disparate impact where a state college based its employment decisions on tenure status. See id. at 689-90. Here, Gaworski alleges disparate treatment

1707. Interestingly, if Guimbarda had used seniority to distinguish Gaworski and Olker, Gaworski still would have been laid off because although both worked at Capital Resources for about the same amount of time, Olker had worked for ITT approximately eight years longer than Gaworski. Again, the evidence here does not suggest that Guimbarda "suppose[d] a correlation" between Gaworski's age and his status as the "highest paid" employee and acted accordingly. See id.; Anderson, 1994 U.S. App. LEXIS 437 at *20 (employee could not prove age discrimination even if he was fired simply because employer desired to reduce its salary costs by discharging him).

Finally, the mere fact that Gaworski was "pension eligible" is not enough to infer age discrimination. Contrary to the implication of the court, the decision to lay off Gaworski did not deprive him from his pension because he had already qualified to receive his base pension benefits. Although the decision may have deprived him of the possibility to qualify for a higher pension (thirty to forty percent more) with added years of service, company policy required him to work for ITT for approximately ten more years. Such an assumption requires too much speculation. Indeed, Gaworski's argument might be more persuasive if ITT had terminated him immediately before he became eligible for an increase in pension benefits as eligibility was based on meeting the preliminary age requirement of fifty-five as well as years of service. Cf. Hazen Paper, 113 S. Ct. at 1707-08 (limiting holding to plans with only a years-of-service eligibility requirement).

The court also concludes that age discrimination is established because ITT's reasons for retaining Olker instead of Gaworski were pretextual. The court concludes that a

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resulting from the reduction in force and Guimbarda's decision to retain Olker.

reasonable jury could conclude that Gaworski's job was not "eliminated" as ITT claims because Olker replaced him, and that Gaworski was more qualified than Olker for the position, and that these facts are sufficient to support an inference of age discrimination.

To ultimately prevail, however, Gaworski must show not only that ITT's reasons were pretextual, but that age was the real reason for firing him. Hicks, 113 S. Ct. at 2747. This he failed to do. Guimbarda testified that in downsizing the division, he needed credit analysis and credit investigation skills more than he needed supervisory skills. He explained that he chose to retain Olker over Gaworski because Olker had more computer experience, had about the same amount of time in the division as Gaworski, and had more experience doing actual credit write ups and analysis. Guimbarda testified that Olker's computer experience[19] was the critical difference because Olker could fix the computer system if it went down. Gaworski admitted that Olker had more computer experience and had been involved in developing the Capital Resources' software. Although Gaworski believed another employee had more familiarity with how the system worked, he did not dispute Olker's capabilities. Instead, Gaworski attacks ITT's need for Olker's computer skills in the "manager of credit and administration" position. Gaworski points out that the "manager of credit and administration" job description neither lists computer work as a responsibility, nor requires computer skills in its description of qualifications. Nevertheless, Gaworski conceded that ITT's job descriptions are not rigidly followed. Gaworski's own job description described his title as "manager of credit and operations," while Gaworski testified that his title was "vice president and investment

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[19] In fact, Olker had a significant role in creating the computer programs, and thus, Guimbarda concluded this special knowledge was important should the system "crash."

director." Gaworski also admitted that when he hired Olker for a senior investment manager position, Olker did not meet the minimum listed qualifications. Gaworski also testified that he did not remember whether he had considered the job description when he recommended Olker for the position, and although Olker did not meet the listed qualifications, he did not think he was discriminating against anyone. Thus, viewing the evidence in the light most favorable to Gaworski, I believe that there is insufficient evidence to show that Gaworski's age, not Olker's computer skills or some other reason, was the real reason ITT retained Olker instead of Gaworski. See id. at 2752-56. Again, this court cannot second guess a business' decision that computer skills are valuable to a division that has lost five employees. Jorgensen, 761 F.2d at 505; see Neufeld, 884 F.2d at 340; Bell, 778 F.2d at 515; see generally Walker, 995 F.2d at 846.

Even assuming that all of Guimbarda's stated reasons were false, that does not answer the ultimate question. Merely proving that Guimbarda's reasons are false is not enough to prove unlawful age discrimination--Gaworski must prove that age discrimination was the real reason for his termination. Id. at 2755-56. There is insufficient evidence on this record to link any of Guimbarda's decisions to Gaworski's age.

Finally, although direct evidence is not required to prove age discrimination, Gaworski presented no direct evidence or pattern and practice evidence from which discrimination might be inferred. Gaworski testified that he did not sense any hostility from Guimbarda regarding his age, no one at ITT had ever referred to his age in a disparaging way, he had never been treated badly because of his age, and no documents referred disparagingly to his age. The Capital Resources group hired Gaworski when he was 53. Nor was there evidence of any negative comments about older people generally. Guimbarda had hired several employees in the protected class, and other than Gaworski, never fired any

other employees who were in the protected class. Indeed, none of the other laid-off employees was in the protected age group. The evidence is simply not enough to create a jury question.

For the same reasons, I also conclude that Gaworski failed to make a prima facie case under Holley v. Sanyo Manufacturing Inc., 771 F.2d at 1161, 1166-68 (8th Cir. 1985),[20] by demonstrating "additional evidence" that age was a factor in his termination.

After carefully examining the evidence, I conclude that no reasonable jury could have found that Guimbarda fired Gaworski because of his age. Accordingly, I dissent and would reverse the district court's order denying ITT's motion for judgment notwithstanding the verdict.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

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[20] The court today also concludes that this is not a reduction in force case governed by Holley v. Sanyo Manufacturing Inc., 771 F.2d 1161 (8th Cir. 1985). The court reasons that because Gaworski's duties and office were subsumed by Olker, Capital Resources did not actually "eliminate" Gaworski's position. The court finds further support for its conclusion because there was a lack of objective criteria in determining which jobs would be eliminated. Guimbarda's testimony, however, detailed his objective decision-making process in deciding which employees to lay off. Gaworski does not dispute that the division downsized from 17 to 13 employees, or that the division never hired any more people. Cf. Hillebrand, 827 F.2d at 366 (only one employee involved in the alleged reduction in force). This is obviously a reduction in force case. See id. at 367 ("most cases simply assume that a reduction in force has occurred").

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 92-1753MNST

Richard C. Gaworski, et al.,	*	
	*	
Appellees,	*	
	*	Order Denying Petition
vs.	*	for Rehearing and
	*	Suggestion for Rehearing
ITT Commercial Finance Corp.,	*	En Banc
et al.,	*	
	*	
Appellants.		

The suggestion for rehearing en banc is denied because a majority of the judges in regular active service did not vote to grant. Judge Fagg, Judge Wollman, Judge Beam, Judge Loken, and Judge Hansen would grant the suggestion. The petition for rehearing by the panel is also denied.

April 20, 1994

Order Entered at the Direction of the Court:
s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 92-1753MNST+

Richard Gaworski; Equal Employment Opportunity Commission,	*	
Appellees,	*	Appeal from the United States District Court for the
vs.	*	District of Minnesota
ITT COMMERCIAL FINANCE CORP., et al.,	*	
Appellants.	*	

AMENDED ORDER

The suggestion for rehearing en banc is denied because a majority of the judges in regular active service did not vote to grant. Judge Fagg, Judge Wollman, Judge Beam, Judge Loken, and Judge Hansen would grant the suggestion. The petition for rehearing is also denied.

Judge Bowman and Judge Magill took no part in the consideration or decision of this case.

April 21, 1994

Order Entered at the Direction of the Court:
s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 92-1753MNST

Richard C. Gawowski,	*	
	*	
Appellee,	*	
	*	Appeal from the United
vs.	*	States District Court for
	*	the District of Minnesota
ITT Commercial Finance Corp.,	*	
et. al.,	*	
	*	
Appellants.		

The appellants' motion to reconsider the suggestion for rehearing en banc is denied because a majority of the judges in regular active service did not vote to grant. Judge Fagg, Judge Wollman, Judge Beam, Judge Loken, and Judge Hansen would grant the motion to reconsider. Having disqualified themselves from consideration or decision of this case because of interest, Judge Bowman and Judge Magill did not vote on the suggestion for rehearing en banc or the motion to reconsider.

June 8, 1994

Order Entered at the Direction of the Court:
s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Richard C. Gaworski, Civil File No. 3-88-466

Plaintiff,

v. **ORDER**

ITT Commercial Finance Corp., a Nevada corporation; ITT Financial Corporation, a Delaware corporation; ITT Corporation, a Delaware corporation; Melvin F. Brown, individually and as an officer of ITT Commercial Finance Corp.; and Robert E. Laws, individually and as an officer of ITT Financial Corporation,

Defendants.

John J. McGirl, Jr., Esq., Deborah B. Hilke, Esq., Doherty, Rumble & Butler, P.A., 3750 IDS Tower, Minneapolis, MN 55402, on behalf of the plaintiff.

Robert R. Reinhart, Jr., Esq., Lucinda E. Jesson, Esq., Ann M. Curme, Esq., Oppenheimer, Wolff & Donnelly, 3400 Plaza VII, 45 South Seventh Street, Minneapolis, MN 55402, on behalf of the defendants.

This matter is before the court upon the motions of defendants ITT Financial Corporation and ITT Corporation for summary judgment. Having considered the submissions of the parties and the arguments of counsel, the court determines

that genuine issues of material fact exist that preclude summary judgment.

Accordingly, **IT IS ORDERED** That defendants' motions for summary judgment shall be, and hereby are DENIED.

Dated: May 19, 1989.

S/S
Paul A. Magnuson
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Richard C. Gaworski,

Plaintiff,

v.

Equal Employment Opportunity Commission,

Plaintiff-Intervenor,

v.

ITT Commercial Finance Corp., a Nevada Corporation; ITT Financial Corporation, a Delaware Corporation; ITT Corporation, a Delaware Corporation,

Defendants.

Civil File No. 3-88-0466

ORDER

Steven E. Rau, Esq., Maun and Simon, 2300 World Trade Center, 30 East 7th Street, St. Paul, MN 55101-4904, for plaintiff.

Lloyd Zimmerman, Esq., Equal Employment Opportunity Commission, 310 West Wisconsin Avenue, Suite 800, Milwaukee, Wisconsin 53203-2292, for plaintiff-intervenor.

Robert M. Reinhart, Jr., 3400 Plaza VII, 45 South Seventh Street, Minneapolis, MN 55402, for defendants.

This matter is before the court upon defendants' motion for summary judgment. The court has considered the submissions of the parties and concludes that material factual disputes preclude summary judgment.

Accordingly, defendants' motion is **DENIED.**

Dated: September 17, 1990.

S/S

Paul A. Magnuson
United States District Court Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Richard C. Gaworski,

Plaintiff,

Civil File No. 3-88-0466

SPECIAL VERDICT

Equal Employment Opportunity Commission,

Plaintiff-Intervenor,

v.

ITT Commercial Finance Corp., a Nevada corporation; ITT Financial Corporation, a Delaware corporation, and ITT Corporation, a Delaware corporation,

Defendants.

We, the jury, empaneled and sworn for the trial of the above-entitled action, answer the questions submitted as follows:

1. Do you find from a preponderance of the evidence that age was a determining factor in Richard C. Gaworski's termination?

___X___Yes _____No

If your answer is "No", then answer no further questions; if your answer is "Yes" then answer the next 2 questions.

2. What percentage of change in compensation would Mr. Gaworski have received had he continued in his employment with defendant?

December 1, 1986	5.5 %
December 1, 1987	5.0 %
December 1, 1988	4.0 %
December 1, 1989	4.0 %
December 1, 1990	4.0 %

3. Do you find from a preponderance of the evidence that defendants' decision to discharge the plaintiff because of his age was willful?

_____ Yes X No

Dated: Nov. 25, 1991

s/ David E. Drew
Foreperson

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Richard C. Gaworski,

Plaintiff,

Equal Employment Opportunity Commission,

Plaintiff-Intervenor,

v.

ITT Commercial Finance Corp., a Nevada corporation; ITT Financial Corporation, a Delaware corporation; ITT Corporation, a Delaware corporation,

Defendants.

Civil File No. 3-88-0466

MEMORANDUM AND ORDER

INTRODUCTION

This matter is before the court on defendants' motion for judgment notwithstanding the verdict or in the alternative for a new trial. Based on the following reasons defendants' motion for judgment as a matter of law is DENIED. Defendants' motion for a new trial is DENIED.

DISCUSSION

In support of their motion, defendants contend there is insufficiency of evidence to support the jury's finding of age discrimination. A judgment notwithstanding the verdict should be granted only when all the evidence points one way and is susceptible of no reasonable inferences sustaining the position of the non-moving party. Beshaers v. Asbill, 930 F.2d 1348 (8th Cir. 1991).

Defendants cite to Holley v. Sanyo Mfg., Inc., 771 F.2d 1161 (1985) for the proposition that plaintiff has failed to establish a prima facie case. Specifically defendants quote the following text of the opinion:

> . . .most centrally, (plaintiff) claims that the fact that he was replaced by a younger man, in a situation where he had greater experience and expertise than his replacement (and was also making more money than his replacement), was evidence of (age) discrimination. The fact alone that (plaintiff's) duties were assumed by a younger person--the fact of an age differential--itself is insufficient additional evidence to establish a prima facie case. Holley, at 1167.

Defendants, however, have failed to include the following pertinent language from the Holley case:

> Had this not been a reduction-in-force case involving eliminated positions, but rather, a case involving the replacement of an older person with a younger one where the

> position remained the same, then Holly's testimony might carry more force. In Dace v. ACF Industries, Inc., 722 F.2d 374, 378 (8th Cir. 1983), for example, the plaintiff's evidence that the company saved money by demoting him and **knew** that it would save money, was strong enough to lead us to reverse the district court's directed verdict. Holley, at 1168.

Thus, the Holley decision, when considered in its totality, supports rather than thwarts plaintiff's case. Contrary to defendants' assertions, Gaworski's termination was not merely the result of a reduction in force. At the time of Gaworski's termination his position was not eliminated. Rather, Gaworski's position remained open and Gaworski was replaced by another employee. A significant amount of evidence was introduced at trial demonstrating that Gaworski had been performing satisfactorily and his position remained open after his termination. Therefore, even under the Holley analysis, sufficient evidence was before the jury that Gaworski was replaced by a younger and less compensated employee.

Defendants also seek a new trial claiming that the verdict is "internally inconsistent and irreconcilable with a single unanimous jury determination of intentional discrimination."

Defendants suggest that the jury's determination of discriminatory intent, which was an "essential element of plaintiff's claim," is indistinguishable from the jury's finding that defendants' conduct was not willful. Therefore, defendant contends that the jury, by finding there was no willful discrimination, necessarily found that there was no purposeful, intentional discrimination.

Defendants' position is without support. The Eighth Circuit in Betha v. Levi Strauss & Co., 827 F. 2d 355 (8th Cir. 1987) addressed the standard required to establish "willful"

discrimination as opposed to a mere violation of the Age Discrimination Act. The Betha court stated "we must seek a standard for willfulness that distinguishes between a violation [of the ADEA], which is almost always intentional, and a willful violation, leading to double damages." Bethea, 827 F.2d at 359 (cites omitted). The court observed, "willful" is if the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA. Bethea, at 358-359. [T]he essence of punitive damages is that they may be awarded "for conduct that is outrageous." Bethea, at 359 (cites omitted). Thus, it is plausible, under the Bethea holding, that a jury could find that an employer discriminated in violation of the ADEA yet the employer's actions did not amount to a "willful" violation.

Defendants also assert the court committed several errors with respect to the admissability of evidence and therefore seek a new trial. First, defendants propose a new trial should be granted because of the court's pretrial ruling which prohibited defendants from introducing evidence that Gaworski was "asked to leave" his previous employer Peat Marwick. The court ruled at pretrial and continues to believe that Gaworski's performance at Peat Marwick is not relevant with respect to defendants' decision to terminate Gaworski while employed at ITT. Second, defendants assert it was improper to forbid evidence that the Capital Resources Group, of which Gaworski was a member, eventually went completely out of business. Defendants' argument is without merit. As the court found earlier, it is not relevant that the Capitol Resources Group went out of business five years after Gaworski's termination. Evidence that the division ceased operations five years after Gaworski's termination is not relevant in determining defendants' motivation for terminating Gaworski. Accordingly, the court does not believe a new trial is warranted.

Based on the above, IT IS HEREBY ORDERED that defendants, ITT Corporation, ITT Financial Corporation, ITT Commercial Finance, motion for judgment notwithstanding the verdict (docket #60) is DENIED. Defendants' motion for a new trial is DENIED.

Dated: February 4, 1992.

S/S

Paul A. Magnuson
United States District Court Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Richard C. Gaworski, Civil File No. 3-88-0466

Plaintiff,

Equal Employment Opportunity Commission,

Plaintiff-Intervenor,

MEMORANDUM AND ORDER

v.

ITT Commercial Finance Corp., a Nevada corporation; ITT Financial Corporation, a Delaware corporation; ITT Corporation, a Delaware corporation,

Defendants.

INTRODUCTION

This matter is before the court on the parties' position with respect to damages. By jury verdict defendants were found to have violated the Age Discrimination Employment Act. However, with respect to damages, the jury determined only the annual percentage salary increase Gaworski would have received had he remained employed. All other damage

issues were reserved for post verdict determination. The court addresses each of the parties' claims separately.

DISCUSSION

I. Back Pay and Offsets Against Back Pay.

The parties agree that pursuant to the jury verdict, Gaworski's back pay from the time period November 1, 1986 to April 30, 1991 totals $387,523.27.

II. Offsets Against Back Pay

Plaintiff has presented the following as "possible" offsets against back pay: Unemployment compensation in the amount of $12,101.00; Salary from first employer in the amount of $54,875.00; Salary from second employer in the amount of $54,655.00; Consulting Income in the amount of $7,345.00; ITT Pension Payments in the amount of $18,061.80. The court concludes that the salaries from both employers, $54,875.00 and $54,655.00 respectively, should be offset against Gaworski's back pay award. Further, the court believes the unemployment compensation of $12,101.00 should be offset against back pay. The inclusion of unemployment compensation as mitigation income is normally within the discretion of the district court. Orzel v City of Wauwatosa, 697 F.2d 743, 756 (10th Cir. 1983), cert. denied 464 U.S. 992, 104 S.Ct. 484 (1983). To allow Gaworski to receive unemployment compensation as well as the back pay would provide double recovery. However, the court believes that the ITT Pension Payments in the amount $18,061.80, were from a collateral source and therefore should not be deducted from Gaworski's back pay award.

III. Prejudgment interest rate applicable to Gaworski's back pay award.

The parties do not appear to dispute whether prejudgment interest ought to be awarded to Gaworski for his loss of income dating back to July 1986. Rather, the issue is what interest rate should apply. The award of interest is within the trial court's discretion. Conway v. Electro Switch Corp., 825 F. 2d 593, 602 (1st Cir. 1987). Freeman v. Package Machinery Co., 865 F.2d 1331, 1344 (1st Cir. 1988). After review of the submissions of the parties the court concludes that the post-judgement interest rate pursuant to 28 U.S.C. § 1961 is the appropriate prejudgment interest rate. See E.E.O.C. v. Gurnee Inn Corp., 914 F.2d 815 (7th Cir. 1990).

IV. Pension Rights

The parties have stipulated that the court include in its judgment an order directing defendants to pay the pension benefits Gaworski would have received had he continued employment until April 30, 1991. Pursuant to this stipulation the court grants Gaworski those pension benefits that would have accrued had he not been terminated.

IV. Other Damages

The statute's purpose is "to make persons whole for injuries suffered as a result of unlawful employment discrimination." Gibson v. Mohawk Rubber Co., 695 F.2d 1093, 1097 (8th Cir. 1982). Plaintiff seeks the following "other damages".

A Contributions to ITT's 401(k) savings plan.

Plaintiff asserts he is entitled to damages for amounts that ITT would have matched as contribution to plaintiff's 401(k) plan had Gaworski continued employment. In that plan, ITT "matched" up to three percent of each employee's salary. Plaintiff submissions show this amount to be $11,625.71. The court agrees that this damage amount is necessary "to make plaintiff whole" and therefore grants plaintiff this amount.

B. Job Search Expenses

The court believes the costs Gaworski incurred in searching for alternate work should be reimbursed "to make the plaintiff whole." Therefore, the court grants a damage award of $4,151.50 for job search expenses.

C. Premiums on Partial Insurance Replacement

Plaintiff seeks reimbursement on payments he made to secure insurance after his termination. Gaworski is entitled to replace benefits lost as a result of his termination. Tolan v. Levi Strauss & Co., 867 F.2d 467, 470 (8th Cir. 1989). Therefore, the court grants plaintiff's claim of $4,467.00 for premiums on partial insurance coverage.

D. Lost Earnings on Withdrawal from ITT Savings Plan

The court declines to award plaintiff's claim of $8,480.00 for lost earnings on early withdrawal from ITT's savings plan because these damages are speculative at best.

E. Excess Personal Income Taxes from Early Withdrawal from ITT Savings Plan

The court believes it is inappropriate to award $21,629.00 in damages for excess personal income taxes incurred by plaintiff due to early withdrawal from ITT's savings plan. The court feels consequential damages of this nature are not necessary within the meaning of the ADEA to make plaintiff whole.

V. Minnesota Human Rights Act Claim

Plaintiff, in addition to the damages awarded under the federal Age Discrimination in Employment Act, seeks damages under the Minnesota Human Rights Act, Minn. Stat. § 363 et seq. (MHRA). This court has pendent jurisdiction over Gaworski's MHRA claim. See Daines v. City of Mankato, 754 F.Supp. 681, 695 (D.C. Minn. 1990). The statute expressly requires that a judge sitting without a jury hear and determine discrimination actions brought pursuant to the Minnesota Human Rights Act. Minn. Stat. § 363.14, Subd. 2.

Gaworski claims that he is entitled to an enhanced compensatory award of damages pursuant to the Minnesota Act. The statute allows the court to order payment of compensatory damages in an amount up to three times the actual damages and allows the court to award punitive damages. The court may also find damages for mental anguish or suffering, reasonable attorney fees and punitive damages in an amount not to exceed $8,500.00.

Plaintiff seeks $5,000.00 for mental anguish and suffering and double his compensatory damages in order to "provide complete and adequate" relief. Enhanced compensatory damages are awarded only where a plaintiff has not been fairly and adequately compensated. Melsha v. Wickes Companies,

Inc., 459 N.W.2d 707, 709 (Minn. Ct. App. 1990). The court believes relief provided under the federal ADEA has provided plaintiff with adequate compensatory damages and therefore feels enhanced compensatory damages are inappropriate. Similarly, plaintiff's claim for damages for mental anguish and suffering under the Minnesota act are unwarranted. The court believes plaintiff has failed to present sufficient facts at trial to support an award of damages for mental anguish and nonetheless believes plaintiff has been adequately compensated for damages.

Gaworski also alleges that he will suffer adverse tax consequences if he is taxed on his back pay award. However, these alleged damages are too speculative in that it is not clear whether Gaworski will, in fact, ever be required to pay income taxes on his back pay award. There is a split in the Circuits whether such amounts are taxable. See Byrne v. Commissioner, 883 F.2d 211 (3rd Cir. 1988) and Rickel v. Commissioner, 900 F.2d 655 (3rd Cir. 1989) and Burke v. United States, 929 F.2d 1119 (6th Cir. 1991), cert. granted, 112 S.Ct. 47 (Oct. 1991) (Burke is currently before the United States Supreme Court yet to be decided). Thus, the court believes it is inappropriate to award as damages the potential tax on back pay.

Plaintiff suggests that a civil penalty of $5,000 pursuant to Minn. Stat. § 363,071, subd.2 (1991), is appropriate. The court does not agree. The Act requires that four factors be taken into consideration before imposing a civil penalty: the seriousness and extent of the violation; the public harm caused by the violation; whether the violation was intentional; and the financial resources of the respondent. In this case the jury found that the discrimination was not willful and no public harm has been asserted or shown by plaintiff. Further, there is no evidence on the record indicating a systematic pattern of discrimination by defendants. Accordingly, the court feels a civil penalty is inappropriate.

VI. Injunctive Relief

The plaintiff intervenor, EEOC has requested three forms of injunctive relief which include an order requiring that ITT no longer engage in discrimination; an order compelling Mr. Guimbarda and Mr. Tate to attend a seminar on the provisions of the ADEA; and an order compelling the posting of a notice detailing the outcome of this case in all ITT facilities nationwide. The court feels such injunctive relief is unnecessary. First, the business unit involved in this case closed operations effective April 30, 1991. Second, the jury verdict and judgment against defendants provides sufficient notice that age discrimination in the work place will not be tolerated. Finally, the jury found that defendants' conduct was not "willful". Thus, the court declines to grant any further equitable relief.

VI. Attorney's Fees

Plaintiff has moved for attorney fees and costs pursuant to the Age Discrimination in Employment Act, 29 U.S.C. § 626(b) and 29 U.S.C. § 216(b). In addition, plaintiff seeks enhancement of attorney fees beyond the straight time approach. In some exceptional cases an enhanced award may be justified. This however, is not such a case. See Hensley v. Eckerhart, 461 U.S. 424, 435, 103 S.Ct. 1933, 1940 (1983); Easley v. Anheuser-Busch, Inc., 758 F.2d 251 (1985). Plaintiff submits $121,662.12 in attorney fees and costs for the law firm of Maun and Simon. Further, plaintiff submits fees and costs in the amount of $35,139.36 for the law firm of Doherty, Rumble & Butler.

Based on the submissions of the court believes the following attorney fees are appropriate. The court grants attorney fees, costs and disbursement to the law firm of Maun & Simon in the amount of $109,628.62. This amount includes

costs and disbursements of $7,128.62. Further, the court grants attorney fees, costs and disbursements with respect to the Doherty Rumble and Butler work in the amount of $22,995.61. This amount includes disbursements in the amount of $2,995.61. The court has reduced the attorneys' fees award to reflect the duplication in work resulting by plaintiff's case being handled by two separate law firms.

Based on the above, IT IS HEREBY ORDERED that:

(1) Defendants pay plaintiff back pay net of off sets in the amount of $265,892.27.

(2) Defendants are ordered to pay those pension benefits that would have accrued had plaintiff not been terminated.

(3) Defendants are ordered to pay plaintiff $11,625.71 representing ITT's 401(k) matching contributions.

(4) Defendants are further order to reimburse plaintiff $4,151.50 job search expenses and $4,467 for premiums on insurance replacement.

(5) The court awards plaintiff prejudgment interest at the statutory rate provided at 28 U.S.C. § 1961.

(6) Plaintiff's request for damages pursuant to the Minnesota Human Rights Act (docket #63) is DENIED.

(7) Defendants are ordered to pay attorney's fees, costs and disbursements (docket #64) in the amount of $109,628.62 for the law firm Maun & Simon and defendants are ordered to pay attorney's fees, costs

and disbursements in the amount of $22,995.61 for the law firm Doherty Rumble and Butler.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: February 4, 1992.

S/S

Paul A. Magnuson
United States District Court Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Richard C. Gaworski, Civil File No. 3-88-0466

Plaintiff,

Equal Employment Opportunity Commission,

Plaintiff-Intervenor,

v. **MEMORANDUM AND ORDER**

ITT Commercial Finance Corp., a Nevada corporation; ITT Financial Corporation, a Delaware corporation; ITT Corporation, a Delaware corporation,

Defendants.

INTRODUCTION

This matter is before the court on the parties' submissions seeking clarification of the court's February 4, 1992 order awarding interest on Gaworski's back pay.

Consistent with its February 4, 1992 order, the court awards Gaworski prejudgment interest on his back pay award based on 28 U.S.C. § 1961. Based on the submissions of the

parties, and averaging the monthly yields for the years in question, the following interest rates apply:

6.4% for 1986
6.7% for 1987
7.69% for 1988
8.54% for 1989
7.9% for 1990
6.0% for 1991

The interest award, which is to be compounded annually, does not apply to attorney's fees.

Dated: February 14, 1992.

S/S
Paul A. Magnuson
United States District Court Judge

SUPREME COURT, U.S.
FILED
SEP 21 1994
OFFICE OF THE CLERK

No. 94-135

In the Supreme Court of the United States

OCTOBER TERM, 1994

ITT COMMERCIAL FINANCE CORP., ET AL., PETITIONERS

v.

RICHARD C. GAWORSKI AND EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

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BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether proof of a prima facie case of age discrimination together with evidence showing that an employer's stated reasons for its decision are unworthy of belief is sufficient to support a jury's finding that the employer discriminated on the basis of age.

2. Whether the evidence in this case was sufficient to support the jury's finding that petitioners discriminated on the basis of age.

3. Whether this Court's holding in *Shenker* v. *Baltimore & O. R.R.*, 374 U.S. 1 (1963), that courts of appeals have discretion to determine when to grant rehearing en banc should be overruled.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A36) is reported at 17 F.3d 1104. The district court's opinion (Pet. App. H1-H5) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 2, 1994. A petition for rehearing was denied on April 20, 1994. Pet. App. B1. The petition for a writ of certiorari was filed on July 19, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1976, respondent Richard Gaworski began working for an ITT company as a comptroller. Pet. App. A4. In 1984, he became Manager of Credit and Operations for ITT's Capital Resources Group (CRG). *Id.* at A4-A5. Two years later, respondent was terminated. At the time of his termination, respondent was 55 years old, which made him the oldest CRG employee. *Id.* at A3-A4.

Thereafter, respondent filed suit in the United States District Court for the District of Minnesota against petitioners ITT Commercial Finance Corp., ITT Financial Corp., and ITT Corp., alleging that the decision to terminate him was based on his age, in violation of the Age Discrimination in Employment Act, 29 U.S.C. 621 *et seq.* The Equal Employment Opportunity Commission (also a respondent here) intervened as a plaintiff.

At trial, petitioners sought to show that Gaworski's position was eliminated as part of a reduction in force (RIF). Pet. App. A4. Respondents submitted evidence, however, that Gaworski's position was not eliminated, and that he was instead replaced by a younger, less qualified employee. The day after Gaworski was fired, John Olker, a 46-year-old credit analyst whom Gaworski had been supervising, was promoted to the supposedly "new" position of Manager of Credit and Administration. *Id.* at A5. Olker received an $8,000 raise, took over Gaworski's office, and assumed "substantially all of Gaworski's former duties." *Ibid.* At the time of his last performance review, Gaworski had generally been rated as above average; Olker had been rated as average and it was recommended that he not be promoted during the next year. *Ibid.* Olker had little, if any, experience supervising credit analysts. *Ibid.*

Petitioners offered evidence that they had retained Olker rather than Gaworski because Olker had more experience performing credit analyses and greater knowledge of the computer system. Pet. App. A5. In response, respondents introduced evidence that Gaworski had a "thorough" understanding of credit analysis, while Olker had performed his first "solo" credit analysis only four months before his promotion. *Ibid.* Respondents also introduced evidence that Gaworski had never been informed about a need for computer skills, that computer skills were not listed on Olker's job description, and that Olker's use of the computer had actually declined by more than 50% after his promotion. *Id.* at A5-A6.

Following a trial, the jury returned a verdict for Gaworski, finding that ITT had discriminated against him on the basis of his age. Pet. App. A3. The district court denied ITT's motion for judgment notwithstanding the verdict or a new trial. *Id.* at H1-H5.

2. The court of appeals affirmed. Pet. App. A1-A36. The court noted that this Court's decision in *St. Mary's Honor Center* v. *Hicks,* 113 S. Ct. 2742 (1993), had "clarifie[d] when the question of discrimination is to be left to the finder of fact and when it may be decided as a matter of law." Pet. App. A7. Relying on the statement in *Hicks* that "rejection of the defendant's proffered reasons, will *permit* the trier of fact to infer the ultimate fact of intentional discrimination" (113 S. Ct. at 2749), the court of appeals stated that "if (1) the elements of a prima facie case are present, and (2) there exists sufficient evidence for a reasonable jury to reject the defendant's proffered reasons for its actions, then the evidence is sufficient to allow the jury to determine whether intentional discrimination has occurred, and we are without power to reverse the jury's finding." Pet. App. A8.

Applying that standard, the court first held that the elements of a prima facie case were present. In particular, the court held that Gaworski was within the class of persons protected by the ADEA, that he was performing his work adequately, and that the evidence supported a finding that Gaworski was not terminated as a result of a RIF, but instead "was replaced by a younger employee." Pet. App. A9.

The court then held that "[e]vidence exists to allow reasonable minds to conclude that each of ITT's proffered nondiscriminatory explanations was pretextual." Pet. App. A10. Acknowleding that the ADEA did not permit the jury to review the "propriety" of a business decision, the court found that the "materially conflicting evidence in this case * * * raises a question of fact as to the *believability,* not the propriety, of ITT's purported reasons for discharging Gaworski." *Id.* at A11. The court thus concluded that "the evidence [was] sufficient to allow a reasonable jury to conclude that ITT's proffered nondiscriminatory reasons were 'unworthy of credence,' * * * [and that] ITT acted for reasons other than what it claimed." *Ibid.* Because the elements of a prima facie case were present and the evidence was sufficient to allow a reasonable jury to reject petitioners' explanations for their decision, the court held that "the jury could infer that discrimination occurred." *Id.* at A11-A12.

3. ITT's petition for rehearing and suggestion for rehearing en banc were denied. Pet. App. B1, C1. Five judges voted to grant rehearing en banc; three judges voted to deny it; and two judges did not participate in the decision "because of interest." *Id.* at C1, D1. Under the Eighth Circuit's rules, judges who disqualify themselves are still considered to be in "regular active service" for purposes of deciding whether rehearing en banc should be granted. Accordingly, petitioners' suggestion for rehearing en banc was denied "because a majority of the

judges in regular active service did not vote to grant." *Ibid.*

ARGUMENT

1. Petitioners contend (Pet. 9-15) that the court of appeals applied the wrong legal standard in holding that the evidence in this case was sufficient to support the jury's finding that petitioners discriminated against Gaworski on the basis of age. The result reached by the court of appeals, however, is consistent with this Court's decision in *Hicks*.

a. In *Hicks*, this Court held that a plaintiff's showing that an employer's stated reasons for a decision are unworthy of belief does not compel a finding of discrimination. 113 S. Ct. at 2749. The Court went on to state, however, that "[t]he factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination." *Ibid.* For that reason, this Court concluded, "rejection of the defendant's proffered reasons, will *permit* the trier of fact to infer the ultimate fact of intentional discrimination." *Ibid.* "[N]o additional proof of discrimination is *required*." *Ibid.*

The court of appeals followed that reasoning. It held that because "[t]he elements of the plaintiff's prima facie case are * * * present and the evidence is sufficient to allow a reasonable jury to reject the defendant's non-discriminatory explanations[,] * * * the jury could infer that discrimination had occurred." Pet. App. A11-A12. That holding properly implemented the rule set forth in *Hicks*.

Petitioners contend that the court's decision is erroneous because it holds that if an employee establishes a prima facie case and proves that the reasons the employer has given for the decision are unworthy of belief, an employer can never obtain judgment as a matter of law. Pet.

12. If the court's opinion were read in that way, it would be an incorrect statement of the proper rule, since in some unusual cases, the evidence may compel a finding that neither the employer's proffered explanation nor discrimination was the real reason for a decision. To take an example given by the First Circuit, if an employer asserted that he fired the plaintiff because he was unqualified, but the evidence unequivocally showed that the plaintiff was really fired because the employer wanted to conceal his own act of embezzlement, a jury could not reasonably infer that the employer discriminated on the basis of age. See *Woods* v. *Friction Materials, Inc.*, No. 93-2296 (July 29, 1994), slip op. 11-12 n.3.

When read out of context, language in the court's opinion might suggest that a defendant could not obtain judgment as a matter of law even in such a case. Pet. App. A8. Because the court of appeals was not presented with that situation, however, the opinion should not be read to address it. Instead, we read the court's opinion to address the far more common situation presented in this case—one where the evidence does not conclusively show that neither the employer's stated reasons nor discriminatory intent motivated the decision. In that context, the court's holding that, if the evidence is sufficient to permit the jury to infer that the employer's proffered reasons were not the real reasons for the action, it is also sufficient to permit the jury to find discrimination, is correct. Under *Hicks*, "[n]o additional proof of discrimination is *required*." 113 S. Ct. at 2749.*

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* As petitioners acknowledge, the court of appeals' decision is consistent with the decisions in *Mitchell* v. *Data Gen. Corp.*, 12 F.3d 1310, 1316 (4th Cir. 1993), *Anderson* v. *Baxter Healthcare Corp.*, 13 F.3d 1120, 1124 (7th Cir. 1994), and *Washington* v. *Garrett*, 10 F.3d 1421, 1433 (9th Cir. 1993). Other circuits have similarly concluded that a showing of a prima facie case together with a showing of

b. Petitioners contend (Pet. 13) that the court of appeals' decision conflicts with the decisions in *LeBlanc* v. *Great American Ins. Co.*, 6 F.3d 836, 843 (1st Cir. 1993), cert. denied, 114 S. Ct. 1398 (1994), and *Bodenheimer* v. *PPG Industries, Inc.*, 5 F.3d 955, 957-958 (5th Cir. 1993). There is, however, no such conflict.

In *LeBlanc,* the First Circuit concluded that "*Hicks* requires that, once the employer has advanced a legitimate, nondiscriminatory basis for its adverse employment decision, the plaintiff, before becoming entitled to bring the case before the trier of fact, must show evidence sufficient for the factfinder reasonably to conclude that the employer's decision to discharge him or her was wrongfully based on age." 6 F.3d at 843. The court of appeals' decision here does not conflict with that statement of the governing legal standard. Instead, consistent with *Hicks,* the court simply concluded that proof that the employer's explanation is unworthy of belief can permit the jury to infer that the employer acted on the basis of age. The First Circuit in *LeBlanc* did not suggest otherwise. Rather, it held that, because the employee in that case failed to produce sufficient evidence of pretext, the employer was entitled to judgment as a matter of law. 6 F.3d at 845-847, 849.

In *Bodenheimer,* the Fifth Circuit stated that, to avoid judgment as a matter of law, a plaintiff is required to "produce sufficient evidence to establish that [the employer's] reasons were pretexts *for age discrimination.*" 5 F.3d at 958. The court then held that the plaintiff in that case

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pretext is sufficient to support a jury's finding of discrimination. *E.g., Cabrera* v. *Jakabovitz,* 24 F.3d 372, 382 & n.9 (2d Cir. 1994), petition for cert. pending, No. 94-216; *Fuentes* v. *Perskie,* No. 93-5561 (3d Cir. Aug. 1, 1994), slip op. 6-7; *Durham* v. *Xerox Corp.*, 18 F.3d 836, 839-840 (10th Cir. 1994); *Batey* v. *Stone,* 24 F.3d 1330, 1334 (11th Cir. 1994).

had failed to introduce sufficient evidence to show that the employer's reasons were pretextual. *Id.* at 958-959. Because the court concluded that the employee had failed to introduce sufficient evidence of pretext, it had no occasion to decide whether such a showing would have been sufficient to permit an inference that the employer acted on the basis of age—the issue decided by the court of appeals here. Although the Fifth Circuit questioned in a footnote whether such proof would have been sufficient in light of *Hicks,* that discussion was both tentative and unnecessary to the court's decision. *Id.* at 958 n.8.

2. Petitioners contend that the evidence in this case was insufficient to support the jury's finding that they discriminated against Gaworski on the basis of age. Pet. 15-18. That fact-bound contention affects only the parties to this case and therefore does not warrant this Court's review. *Rudolph* v. *United States,* 370 U.S. 269, 270 (1962).

In any event, petitioners' sufficiency of the evidence argument is without merit. As the court of appeals noted, while petitioners asserted that Gaworski was fired as a result of a RIF, respondents introduced evidence that Gaworski, who was the oldest employee in his division, was, in fact, replaced by a younger and less qualified employee. In particular, respondents introduced evidence that the day after Gaworski was fired and his position was supposedly eliminated, petitioners promoted Olker to a position with almost the same title. Olker also received a substantial raise, took over Gaworski's office, and assumed almost all of his duties. Respondents also introduced evidence that Gaworski had been given a better performance review than Olker, and that Olker had little, if any, experience supervising analysts. Pet. App. A5.

In response to that showing, petitioners introduced evidence that they retained Olker rather than Gaworski

because of his experience performing credit analyses and his computer expertise. Pet. App. A5. However, as the court of appeals noted, respondents introduced evidence that Gaworski had a thorough understanding of credit analysis, while Olker had only recently begun to perform his own analyses. *Ibid.* Respondents also introduced evidence that Gaworski had never been told about any need for computer skills, that computer skills were not listed on Olker's job description, and that Olker made far less use of his computer skills once he assumed his new position. *Id.* at A5-A6. As the court of appeals concluded, that evidence was sufficient to permit the jury to infer that the reasons given by petitioners for firing Gaworski were not believable and that Gaworski was really fired because of his age. *Id.* at A10-A12.

3. Finally, petitioners contend (Pet. 22-24) that the court of appeals erred in failing to grant rehearing en banc. Of the ten active judges in the Eighth Circuit, five voted in favor of rehearing en banc, three voted against it, and two did not participate in the decision. Pet. App. C1. Because the Eighth Circuit will rehear a case en banc only when an absolute majority of all active circuit judges vote in favor of rehearing, petitioners' suggestion for rehearing en banc was denied.

Petitioners contend (Pet. 23-24) that since a majority of those voting on the rehearing petition voted in favor of it, the suggestion for rehearing en banc should have been granted. According to petitioners, the Eighth Circuit's absolute majority rule is inconsistent with 28 U.S.C. 46, which authorizes rehearing when "a majority of the circuit judges of the circuit who are in regular active service" vote for it.

Petitioners' argument is foreclosed by this Court's decision in *Shenker* v. *Baltimore & O. R.R.*, 374 U.S. 1 (1963). *Shenker* arose in the Third Circuit, which at that

time had eight judges in active service. Of those eight, four voted to grant rehearing en banc, two voted to deny, and two did not vote. The Third Circuit denied rehearing in accordance with its rule providing that rehearing en banc would be granted only when an absolute majority of the active members in the Circuit voted in favor of it. This Court held that the Third Circuit's rule was consistent with 28 U.S.C. 46. 374 U.S. at 4-5. The Court reasoned that Section 46 gives courts of appeals "discretion" to determine the means by which a majority may order rehearing en banc. *Ibid.* To hold otherwise, the Court added, "would involve it unnecessarily in the internal administration of the Courts of Appeals." *Id.* at 5.

Petitioners argue that *Shenker* has led to inconsistent rules in the circuits, with some following the Eighth Circuit's approach and others requiring a majority of those voting. Pet. 22-23. For that reason, petitioners contend, *Shenker* should be overruled. Pet. 23-24. The lack of uniformity about which petitioners complain, however, has existed for decades. Moreover, that lack of uniformity is precisely what this Court's decision in *Shenker* contemplated when it held that the subject was one over which each court of appeals could exercise discretion. The lack of uniformity identified by petitioners therefore provides no basis for overruling *Shenker.*

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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SEPTEMBER 1994

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No. 94-135

In the
Supreme Court of the United States
October Term, 1994

ITT COMMERCIAL FINANCE CORP.,
a Nevada corporation;
ITT FINANCIAL CORPORATION,
a Delaware corporation;
ITT CORPORATION,
a Delaware corporation,

Petitioners,

v.

RICHARD C. GAWORSKI;
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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ARGUMENT[1]

In its Brief in Opposition to ITT's Petition for Writ of Certiorari, Respondent Equal Employment Opportunity Commission ("EEOC") suggests that there is no split amongst the circuits regarding the burden of proof borne by the employment discrimination plaintiff facing a motion for summary judgment or judgment as a matter of law. EEOC further suggests that the Eighth Circuit applied the correct burden in this case and that the result it achieved is a "fact-bound contention [that] affects only the parties to this case." Br. in Opp. at 8. Even a cursory review of the caselaw, however, irrefutably demonstrates that the circuits are indeed split on the appropriate standard of proof. Similarly, a cursory review of the majority and dissenting opinions of the Court of Appeals in this case indicates that what is at issue is the essence of the employment discrimination trial -- the type of evidence needed to prove discrimination. Thus, the Court should grant certiorari in this matter to resolve the circuit court split and to clarify the type of proof necessary to prevail at trial. The Court should also grant certiorari in order to revisit its earlier decisions permitting minority vote disposition of petitions for in banc review, which have led to the inconsistent application of Federal Rule of Appellate Procedure 35 and 28 U.S.C. § 46.

I. THE CIRCUIT COURTS INDEED HAVE SPLIT ON A LEGAL QUESTION BASIC TO THE PROOF OF EMPLOYMENT DISCRIMINATION CLAIMS.

Contrary to EEOC's assertions, the Eighth Circuit did hold in Gaworski v. ITT Commercial Fin. Corp., 17 F.3d 1104, 1109 (8th Cir. 1994), that a plaintiff may survive a motion for judgment as a

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[1] The Rule 29.1 List for Petitioners ITT Commercial Finance Corp., ITT Financial Corporation, and ITT Corporation (collectively "ITT") appears at page ii of ITT's Petition for Writ of Certiorari.

matter of law merely by presenting evidence challenging the wisdom and reasonableness of the explanation the employer has given for its decision, stating: "if (1) the elements of a prima facie case are present, and (2) there exists sufficient evidence for a reasonable jury to reject the defendant's proffered reasons for its actions, then . . . we are without power to reverse the jury's findings." Moreover, the Eighth Circuit reiterated this position less than a month ago in Kobrin v. University of Minnesota, 1994 WL 484397, *4 (8th Cir. Sept. 9, 1994), when it stated, quoting Gaworski, that a plaintiff "may overcome summary judgment by producing evidence that, if believed, would allow 'a reasonable jury to reject the defendant's proffered reasons for its actions.'"[2] Thus, it is beyond dispute that the standard of review applied by the Eighth Circuit in Gaworski did not require Gaworski to produce evidence that ITT's actions were discriminatory, but only that the reasons given for ITT's actions were contestable.

Although EEOC suggests otherwise, see Br. in Opp. at 6-8 & n.*, this is not the only position that the courts have taken on this issue. While some courts have interpreted St. Mary's Honor Center v. Hicks, 113 S.Ct. 2742 (1993), like the Eighth Circuit and held that a plaintiff need only challenge the employer's explanation for its actions in order to reach the jury, see, e.g., Fuentes v. Perskie, 1994 WL 394638, *4 (3d Cir. Aug. 1, 1994); Manzer v. Diamond Shamrock Chems. Co., 29 F.3d 1078, 1083 (6th Cir. 1994), others have quite clearly held that to defeat a motion for summary judgment or judgment as a matter of law, a plaintiff must not only challenge the employer's explanation, but must also offer evidence that the real reason for the employer's actions was discriminatory, see, e.g., Woods v. Friction Materials, Inc., 30 F.3d 255, 260 & n.3 (1st Cir. 1994); Gallo v. Prudential

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[2] See also Waldron v. SL Indus., Inc., 849 F. Supp. 996, 1004 n.11 (D.N.J. 1994) (interpreting Gaworski as standing for proposition that, "where the plaintiff establishes a prima facie case and raises a genuine issue of material fact as to whether the employer's explanation for its action is true, summary judgment is inappropriate").

Residential Servs., L.P., 22 F.3d 1219, 1225 (2d Cir. 1994); Wolenski v. Manville Corp., 1994 WL 89797, **2-**3 (10th Cir. March 17, 1994). Thus, notwithstanding EEOC's claim to the contrary, it is indisputable that the circuits have split on this key issue.[3]

ITT submits that the correct interpretation of Hicks is that arrived at by the First, Second, Fifth, and Tenth Circuits, which have held that to survive a motion for summary judgment or judgment as a matter of law, a plaintiff must offer proof that the employer's explanation for its actions is false and that the true explanation involved discrimination.[4] Seven other circuits, however -- the Third, Fourth, Sixth, Seventh, Eighth, Ninth, and Eleventh -- have held to the contrary.[5] This split must be resolved because the judge's role as referee is nowhere more important

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[3] EEOC questions ITT's characterization of the holdings of the First and Fifth Circuits in LeBlanc v. Great American Ins. Co., 6 F.3d 836 (1st Cir. 1993), cert. denied, 114 S.Ct. 1398 (1994), and Bodenheimer v. PPG Indus., Inc., 5 F.3d 955 (5th Cir. 1993). Woods demonstrates that ITT's interpretation of the First Circuit's position in LeBlanc, was accurate, however, and the Court in Bodenheimer could not have been more clear as regards the standard it was applying. The weakness of EEOC's claim that there is no split is further demonstrated by its complete failure to address Waldron, which, as ITT noted in its Petition for Writ of Certiorari, expressly found that the circuits were split.

[4] See Woods v. Friction Materials, Inc., 30 F.3d 255, 260 & n.3 (1st Cir. 1994); Gallo v. Prudential Residential Servs., L.P., 22 F.3d 1219, 1225 (2d Cir. 1994); Bodenheimer v. PPG Indus., Inc., 5 F.3d 955, 957-58 (5th Cir. 1993); Wolenski v. Manville Corp., 1994 WL 89797, **2-**3 (10th Cir. March 17, 1994).

[5] See Fuentes v. Perskie, 1994 WL 394638, *4 (3d Cir. Aug. 1, 1994); Mitchell v. Data Gen. Corp., 12 F.3d 1310, 1316 (4th Cir. 1993); Manzer v. Diamond Shamrock Chems. Co., 29 F.3d 1078, 1083 (6th Cir. 1994); Anderson v. Baxter Healthcare Corp., 13 F.3d 1120, 1124 (7th Cir. 1994); Gaworski v. ITT Commercial Fin. Corp., 17 F.3d 1104 (8th Cir. 1994); Washington v. Garrett, 10 F.3d 1421, 1433 (9th Cir. 1993); Batey v. Stone, 24 F.3d 1330, 1334 (11th Cir. 1994).

than in the field of employment discrimination, where challenged employment decisions are often unavoidably subjective and debatable, where juries are often asked to reach conclusions based on inferences, and where the issues involved can arouse passion and prejudice. If judges are to fill this role with consistency and achieve both the appearance and the promise of justice, they must be given guidance as to the proper burden of proof applicable to the employment discrimination plaintiff. ITT, therefore, asks this Court to grant certiorari and address this constantly recurring issue.

II. GAWORSKI ADDRESSES THE HEART OF AN EMPLOYMENT DISCRIMINATION TRIAL – THE TYPE OF PROOF NEEDED TO SUPPORT AN INFERENCE OF DISCRIMINATION.

EEOC attempts to dismiss the importance of the result in this case as "fact-bound" and of interest only to the parties involved. Br. in Opp. at 8. In so doing, EEOC misses the point: the central issue of most employment discrimination trials -- because direct evidence of discrimination is lacking -- is whether the plaintiff's evidence supports an inference of discrimination. This is inherently a factual issue, but one that must be guided by clear rules of law. In this case, which involved a stipulated reduction in the size of an incumbent work force, the Court found that a prima facie case of discrimination existed when a 56 year old employee was let go and the bulk of his duties were reassigned to a 46 year old employee who had greater seniority. Gaworski, 17 F.3d at 1109. The Court then went on to find that the plaintiff had proven discrimination vel non by challenging the need for the reduction and the accuracy of the employer's evaluation of who would be the best employee to retain. Id. at 1109-10. The dissent found that Gaworski had failed to state a prima facia case, however, and, "reject[ing] the [majority's] proposition that the inference from the prima facie case has continuing preemptive force," further stressed that there was no evidence to link ITT's

actions with Gaworski's age, the central issue in the case. Id. at 1115-1122. The majority and dissenting opinions' different approaches to analyzing the same age-neutral evidence and the contrasting opinions of the circuit courts directly call into question the type of proof required to prove discrimination. The Court should grant certiorari to clarify this issue and prevent verdicts of bias rooted in speculation or second-guessing of legitimate business judgment.

III. THE STANDARD FOR GRANTING REHEARINGS IN BANC SHOULD BE RECONSIDERED.

EEOC points out, as did ITT, that in Shenker v. Baltimore & Ohio R.R. Co., 374 U.S. 1 (1963), the Supreme Court held that the circuits have discretion to determine how rehearings in banc should be granted. ITT submits that the time is ripe for the Court to revisit this issue in light of the inconsistency with which the in banc rule has been applied and the lower courts' own requests for guidance. Thus, ITT asks that the Court grant certiorari on this issue.

CONCLUSION

For the foregoing reasons, ITT asks the Court to grant its petition for a writ of certiorari and to clarify these issues which recurrently vex so many lower courts relative to a subject matter that dominates their dockets.

Respectfully submitted,

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